Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance–Class Action Issues

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Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Class Action Issues

By James R. McCall*

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† The themes developed in this article on the concepts and realities in procedure and substance with respect to class action issues are further explored in regard to repossession and adhesion contract theory issues in an article being prepared by this author for publication in Volume 26 of the Hastings Law Journal.

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The seller-consumer relationship is as old as commerce itself, yet the idea that the judiciary should assume anything other than a passive role toward the interests of buyer or seller in the consumer marketplace is of much more recent vintage.¹ A conveniently latinate phrase, caveat emptor, was used in many English and American decisions during the nineteenth century to refer to the assumption that a court should adopt a truly laissez faire attitude toward the fairness of any contract which came before it.² A number of American legal scholars, beginning early in this century, have argued for the creation of a dual system of contract law, in which courts would approach contracts between businessmen in the traditional laissez faire manner while adopting a much more interventionist attitude toward contracts where a consumer, meaning a purchaser for household or personal end use, was involved.³ However, with the exception of only a few deci-

¹ Historically, English and American courts adhered to a policy of noninterference with the nature of a bargain struck between legally competent parties. Certainly it is agreed that such was the dominant judicial attitude during the periods of growth and development of the capitalist economies of the two nations. J. Calamari & J. Perillo, Contracts 4-6 (1970); 6 A. Corbin, Corbin on Contracts 20-21 (1962); Williston, Freedom of Contract, 6 Cornell L. Rev. 365, 373-74 (1921). This idea was celebrated and immortalized by Sir Henry Maine who stated that “the movement of the progressive societies has hitherto been a movement from status to contract.” H. Maine, Ancient Law 165 (1873). Almost as often quoted by contract scholars as being expressive of the prevailing nineteenth century judicial sentiment is this passage from Sir George Jessel, writing in Printing & Numerical Registering Co. v. Sampson, L.R. 19 Eq. 462, 465 (1875): “If there is one thing which more than any other public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily shall be held good and shall be enforced by Courts of justice.”

² For numerous examples and an entertaining critique on the legitimacy of the use of the phrase see Hamilton, The Ancient Maxim Caveat Emptor, 40 Yale L.J. 1133, 1175-81 (1931).

³ See, e.g., Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629 (1943); Llewellyn, On Warranty of Quality, and Society, 36 Colum. L. Rev. 699 (1936), 37 Colum. L. Rev. 341 (1937); Patterson,
sions, our courts until recently have abstained from openly policing consumer transactions. Thus it is not surprising that the law of “consumer protection,” which is designed to insure consumers more equitable treatment in the seller-consumer relationship, is primarily statutory.  

In this country, the power of the judiciary to restructure and intervene in legal relationships through application of the due process clause of the Fourteenth Amendment is both awesome and protean. However, this power has not been exercised in the consumer field until quite recently. While at one time American courts used the due process clause to strike down legislation affecting several aspects of commerce, the areas of such intervention were primarily labor relations and the production process; and even this use of the due process clause is generally considered a relic of the past and of only historical interest.  

With the 1969 decision in Sniadach v. Family Finance Corp., however, the United States Supreme Court took an initial, but extremely large, step toward injecting the requirements of the due process clause as a new consideration in the seller-consumer relationship. In Sniadach, the Court held that prejudgment wage garnishments without a judicial hearing violated the due process rights of the consumer defendant. The holding and rationale of the case have received truly extensive comment during the past five years, and the litigation and debate of the issues raised by the decision will undoubtedly continue.


5. See generally B. Schwartz, CONSTITUTIONAL LAW 165-68 (1972). A clear and unequivocal announcement that the “substantive due process” theory under which the Supreme Court struck down regulatory legislation appears is no longer accepted appears in Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423-25 (1952). In this connection note Justice Black’s admonition that the Supreme Court is ushering in a new era by resurrecting the notion of substantive due process to protect property rights in his vigorous dissent in Sniadach v. Family Finance Corp., 395 U.S. 337, 356 (1969) (Black, J., dissenting). As will be discussed in the second installment of this article, the author believes that Justice Black’s point in this regard has some validity.


7. The number of legal articles and lower court decisions generated by the Sniadach decision is so voluminous as to defy attempts at citation. The United States Supreme Court has considered issues raised by the decision in three subsequent cases: D.H. Overmeyer Co. v. Frick Co., 405 U.S. 174 (1972), Swarb v. Lennos, 405 U.S. 191 (1972) and Fuentes v. Shevin, 407 U.S. 67 (1972).
We shall not be concerned here with *Sniadach* or with prejudgment creditor seizures of property, but with another subject in the law of consumer protection in which due process requirements may be vital, the class action. Although this procedure is neither new nor designed specifically for the use and protection of consumers, its continued use as a vehicle for consumer relief is gravely threatened by a recent judicial application of the due process clause. Since many commentators view the existence of the consumer class action as truly vital to effective consumer protection, it is wise to give first priority to its consideration.

As we examine the relationship between the due process clause and procedural and substantive issues in consumer protection, a number of themes will be seen to appear and reappear. The first and most prevalent is the need for development of new analytic concepts for use by the courts in considering the application of the due process clause. A major problem, as here perceived, is the clash between outdated concepts and new realities, a common source of difficulty in constitutional law. Depending on one's point of view, the concepts are either outmoded or immutable, while the realities are either insistent or transitory. It is both fair and accurate to say that the courts generally have not ignored the problem, but have begun the process of formulating new and needed concepts and are thus continuing their constant reinspection of society, one of the primary activities of any judiciary in performing its institutional function. This article contends that this process indeed has begun and argues for a more conscious, thorough and expeditious approach.

A second general theme, already intimated above, is that new substantive rights for consumers are emergent in recent judicial applications of the due process clause. Substantive due process is, in some minds, an idea whose time has passed. A case will be made here, however, for the proposition that a new concept of substantive due process concerned with the protection of elemental property rights is nascent in recent Supreme Court decisions. This theme constitutes an evolution in the Court's thinking and cannot be perceived without resort to that most intriguing scholarly pastime, analyzing the Court's collective mind, in the sense of attempting to sort out the underlying rationales for the Court's newly found concern for the American consumer *qua* consumer. This activity is well worth undertaking, yet it carries with it possibilities for error and inanity. The risks are accepted here.
The third, and final, theme is that some discussion of the economics involved in the legal issues considered in this article is valuable. A belief that economic analysis has a place in the resolution of legal issues reflects the thinking seen in the proliferating body of literature in the field of law-economics studies. The type of economic analysis involved is not of a technical nature, and the focus upon the policy which naturally flows from any discussion of economics will, it is hoped, be helpful to the reader.

II. Class Actions and Due Process

A. The Issues and Problems Involved

Class actions in the federal court are authorized specifically by Federal Rule of Civil Procedure 23,8 and many states have statutory authorizations for class action procedures. The class action has been viewed as an ideal, and perhaps the only truly appropriate, vehicle of relief for abused consumers and other groups who suffer "mass wrongs," where damages suffered by the individuals in the group are small.9 In such cases, due to the large number of victims, the aggregate damage is often quite large. In the usual consumer abuse situation, such as a false advertisement with national or regional circulation, this large aggregate damage directly benefits the wrongdoing party through inflated sales and profits. This fact, coupled with the small individual damage amount and resultant lack of economic incentive to the injured consumer to bring suit, results in a grotesque situation; a wrongdoer has a large economic incentive to plunder consumers by such means as false advertising, with the expectation that only a few victims would or could bring suit against him.

Class actions which permit aggregation of damages in mass wrong situations, assuming a "commonality" of the facts establishing liability for the harm to each individual, have been used more and more frequently in recent years by such groups as shareholders,10 overcharged victims of antitrust violations,11 environmentalists12 and abused con-

sumers. However, since the revision of Rule 23 in 1966, a number of questions relating to the constitutionality of certain procedures used by lower courts in class action cases have arisen. The resolution of the most important of these questions is now imminent, and, ironically, the decision which is forcing these issues was rendered in a case which previously had generated a number of extremely liberal and nurturing decisions interpreting and applying Rule 23.

The decision in question is Eisen v. Carlisle & Jacquelin, decided in May, 1973 and popularly known as Eisen III. It is the most recent opinion in a complex course of litigation which commenced in the Southern District of New York in 1966. The Eisen III court made determinations on the following issues: (1) What types of notice to absent class members is sufficient to bind them, under res judicata principles, by a final judgment? (2) Can the costs of such notice be allocated between the parties? and (3) What methods are permissible for computing and distributing damages in a class action?

It is the author's contention that the decision of the United States Court of Appeals for the Second Circuit in analyzing these issues failed to give adequate consideration to two relevant and important theories: (1) the evolving constitutional right of meaningful access to the courts, and (2) the therapeutic benefits of class actions. Both of these theories are firmly based upon the realities of the common "mass wrong" consumer abuse situation, where the victims are neither aware of their rights nor do they have an economic incentive to bring individual legal actions. Both theories require the judiciary to break away from casting the procedural requirements of the due process clause on the mold of the traditional concept of civil litigation

14. 479 F.2d 1005 (2d Cir. 1973), cert. granted, 414 U.S. 908 (1973). On May 28th, 1974, while the present article was in galley form, the Supreme Court rendered an opinion affirming the Second Circuit decision. The Supreme Court's opinion can, at present, be found only at 42 U.S. Law Week 4804. The Supreme Court's opinion is discussed extensively in the Author's Note following footnote 206 of this article at page 1405, infra. It should be mentioned at this point that the Supreme Court's opinion is extremely narrow in its holdings and is based exclusively on a "strict construction" of the present language of Rule 23. Thus, only a small portion of the text of this article, specifically the text accompanying footnotes 167-172 and 185-188, is superseded by the Supreme Court's decision. The Author's Note, infra, specifically deals with the effect of the Supreme Court's opinion on the views expressed in this article regarding the crucial and still unresolved issue of the requirements of the due process clause and class action procedures.
15. See text accompanying notes 102-137 infra.
16. See text accompanying notes 64-101 infra.
as involving one or more legally aware and financially self-sufficient plaintiffs suing one or more similarly aware and fully financed defendants. This traditional concept is obviously inappropriate to the realities of the contemporary consumer's situation and should be altered to conform to those realities.

Our discussion of Eisen will begin with a brief description of the Eisen litigation and the Eisen III decision. Next, the evolving constitutional right to meaningful participation in the litigation process, and the therapeutic benefits theory of class actions, will be examined. Finally, the Eisen III decision will be analyzed in some depth, and evaluated in terms of its responsiveness to these two theories.¹⁷

B. The Eisen Litigation and Eisen III

In 1966 Morton Eisen filed an antitrust suit on behalf of himself and all other "odd-lot stock investors" against the major odd-lot dealers on the New York Stock Exchange and against the Exchange itself. The suit alleged that the dealer-defendants had violated the Sherman Act by conspiring to monopolize the odd-lot business and by fixing prices in the form of an excessive "odd-lot differential."¹⁸ Eisen also alleged that the Exchange had breached its federal statutory duty to regulate odd-lot trading.¹⁹ He purported to represent a class numbering approximately six million odd-lot investors, and claimed damages ranging at different points in the litigation, between $22 mil-

¹⁷. See text accompanying notes 138-206 infra.
¹⁸. Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147 (S.D.N.Y. 1966). "Odd-lots" and "odd-lot differentials" are explained in the first Eisen opinion, id. at 148, and in Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 559 (2d Cir. 1968) (Eisen II). Stocks traded on the New York Stock Exchange are normally bought and sold in "round lots" of 100 shares. A sale and purchase of fewer than 100 shares is called an "odd-lot" transaction. These transactions are handled exclusively "by special odd-lot dealers who buy and sell for their own account as principals." 391 F.2d at 559. On behalf of the purchaser, a brokerage firm places an order with the odd-lot dealer. The price paid by the customer includes the selling price of the stock, the broker's commission, and a charge by the odd-lot dealer known as the "odd-lot differential." The differential is computed by multiplying the number of shares involved in the transaction by a specified fraction of a dollar, expressed as a fraction of a "point." The fraction to be used in any given transaction varies according to the price per share of the stock involved. Thus, for example, if the transaction involved stock selling at $30 per share, the prescribed fraction was 1/8 of a point, or 12 1/2¢. If 50 shares of the stock were involved, the odd lot differential was 12×50 = 6.25.

Eisen alleged that the two odd-lot firms of Carlisle & Jacquelin and DeCoppet & Doremus, who shared 99 percent of the volume of odd-lot trading, had conspired to monopolize the odd-lot industry and to fix an excessive odd-lot industry and to fix an excessive odd-lot differential in violation of the Sherman Act. 41 F.R.D. at 148.

¹⁹. Id.
lion\textsuperscript{20} and $120 million.\textsuperscript{21}

The district court granted defendants' motion to dismiss the suit as a class action on three grounds:\textsuperscript{22} First, the claim of the named party in relation to the total class claim was too small to insure that he would be an adequate representative of the class;\textsuperscript{23} second, issues common to class members did not predominate over individual issues;\textsuperscript{24} third, plaintiff was unable to satisfy the notice requirements of Rule 23.\textsuperscript{25} On appeal, in the decision popularly known as \textit{Eisen I} (also often referred to as the "death-knell" opinion),\textsuperscript{26} the Second Circuit held that the initial determination by the district court that the

\begin{enumerate}
  \item 479 F.2d at 1009.
  \item 41 F.R.D. at 152.
  \item Id. at 150-51.
  \item 41 F.R.D. at 152.
  \item 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967).
\end{enumerate}

An understanding of the procedure followed under Rule 23 is crucial to an understanding of the "death knell doctrine" and of the significance of \textit{Eisen I}. Rule 23 contemplates a bifurcated procedure for class actions. Before holding a hearing on the substantive merits of the claim, the court must determine whether the suit is maintainable at all on a class basis, \textit{i.e.}, whether the requirements set forth in Rule 23(a) and (b) for a class action have been met. A hearing is normally held at which evidence relevant to this determination is presented. This "maintenance hearing" is held pursuant to Rule 23(c)(1). Once it has been determined that the suit is maintainable as a class action, a hearing on the merits may be held.

The \textit{Eisen I} decision determined, as the result of a maintenance hearing, that the suit could not be maintained on a class basis. The merits of Eisen's claim were not considered, and he was permitted to continue the suit on an individual basis.

Eisen appealed to the Second Circuit. Before addressing itself to the issue of the propriety of the dismissal of the suit as a class action, the appellate court was forced to consider the question whether such dismissal was an appealable order—a question going to the very jurisdiction of the Second Circuit to consider the appeal. In \textit{Eisen I}, the Second Circuit concluded that the dismissal was appealable, and thus that it had jurisdiction to consider the propriety of the dismissal. In so ruling, the court conceived and invoked the "death knell doctrine": to deny appealability to the dismissal of the class action would, for all practical purposes, end the lawsuit. "[N]o lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen." 370 F.2d at 120. The Second Circuit concluded, therefore, that the dismissal of the class action was a "final" order as contemplated by 28 U.S.C. § 1291 (1970) conferring appellate jurisdiction of all "final" orders of the district courts.

Defendants sought, and were denied, a writ of certiorari from the Supreme Court after \textit{Eisen I}. 386 U.S. 1035 (1967). The Supreme Court has since, however, granted certiorari to Eisen, to review \textit{Eisen III}. 414 U.S. 908 (1973). Its decision may well turn on a delayed consideration of the death knell doctrine, and avoid altogether a resolution of the crucial issues discussed in this article. See note 63 & accompanying text \textit{infra}. 

suit was not maintainable as a class action was an appealable order. Subsequently, in Eisen II, the Second Circuit vacated the district court's initial denial of the class action and remanded "for further findings necessary for the class action determination." On remand the district court, Harold R. Tyler, presiding, determined that a class action was maintainable. However, the Second Circuit once again reversed in the Eisen III decision.

In holding the class action maintainable, Judge Tyler attempted to answer some of the constitutional and statutory interpretation questions which have arisen under revised Rule 23. First, he held that the requirement of Rule 23 that notice be given to all class members of their right to opt out of the class could be satisfied by giving individual notice to a relatively small portion of the identifiable class members, and published notice to the rest. Second, he held that part of the notice cost could be allocated to the defendant, conducted a "preliminary mini-hearing on the merits" to determine what that allocation should be, and concluded that since it was likely that plaintiff would prevail in the case, defendants should bear 90 percent of the costs of notice. Third, he invoked the "fluid class recovery" concept as a solution to the problem that the class action would otherwise have been "unmanageable."

In an opinion that has been called "frosty" and "withering," the Second Circuit reversed all of these holdings. The Second Circuit determined: (1) that Rule 23(c)(2) requires individual opt-out notice to be sent to each of the two million class members who could

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27. 391 F.2d 555 (2d Cir. 1968).
28. Id. at 570.
31. 52 F.R.D. at 265-68. Opt-out notice notifies absentee class members of their right to exclude themselves from the class by notifying the court. The significance of this is that those class members who exclude themselves will thereby avoid the res judicata effect which would otherwise attach, under Rule 23(c)(3), to a judgment in the action.
33. Id. The balance of notice costs were allocated to plaintiff.
34. 52 F.R.D. at 264-65. A class action such as that prosecuted by Eisen must be "manageable" under Rule 23. The argument that Eisen's suit was unmanageable was made by Judge Lombard in his dissent from Eisen II. See text accompanying notes 189-90 infra. For a discussion of fluid class recovery as a solution to the manageability problem see text accompanying notes 189-206 infra.
be identified with reasonable effort;\textsuperscript{37} (2) that there is no authority in Rule 23 for allocating any portion of the costs of notice to a defendant and Judge Tyler's mini-hearing held for that purpose was improper;\textsuperscript{38} and (3) that neither Rule 23 nor the Constitution permits the use of fluid class recovery as a device to meet the requirement of Rule 23 that the class action be manageable.\textsuperscript{39} A brief description of the Second Circuit's opinion will be presented at this point, while a more thorough analysis is given below.\textsuperscript{40}

In regard to the first holding, Judge Tyler had ordered individual notice to the two thousand class members who had had ten or more odd-lot transactions, and to five thousand other class members selected at random from the approximately two million who could be identified from the records of the defendants.\textsuperscript{41} As to the balance of the class (1,993,000 members), he ordered published notice and specified which newspapers should be used, the frequency of publication of notice, and the size of the notices.\textsuperscript{42} The Eisen \textit{III} court, noting both Judge Tyler's "complete disregard of our specific and unambiguous [prior] ruling [in Eisen \textit{II}] on the subject of actual individual notice to identifiable members of the class"\textsuperscript{43} and the requirement of Rule 23(c)(2) of "individual notice to all members who can be identified through reasonable effort,"\textsuperscript{44} summarily reversed Judge Tyler's elaborate notice order.\textsuperscript{45}

Judge Medina treated the allocation of notice costs and the preliminary mini-hearing as separate issues and noted explicit instructions in Eisen \textit{II} that plaintiff was to bear notice costs.\textsuperscript{46} On that basis, he reversed Judge Tyler's allocation of 90 percent of the notice costs to defendant.\textsuperscript{47} As to the preliminary mini-hearing on the merits, Judge Medina observed that

\begin{itemize}
\item neither in amended Rule 23 nor in any other rule do we find provision for any tentative, provisional or other makeshift determination of the issues of any case on the merits for the avowed purpose of deciding a collateral matter such as which party is to be
\end{itemize}

\begin{itemize}
\item \textsuperscript{37} 479 F.2d at 1015.
\item \textsuperscript{38} \textit{Id.} at 1015-16.
\item \textsuperscript{39} \textit{Id.} at 1017-18.
\item \textsuperscript{40} See text accompanying notes 138-206 \textit{infra}.
\item \textsuperscript{41} 52 F.R.D. at 267-68.
\item \textsuperscript{42} \textit{Id.} at 268.
\item \textsuperscript{43} 479 F.2d at 1015.
\item \textsuperscript{44} \textit{Id}.
\item \textsuperscript{45} \textit{Id}.
\item \textsuperscript{46} 391 F.2d at 568.
\item \textsuperscript{47} 479 F.2d at 1015-16.
\end{itemize}
required to pay for mailing, publishing or otherwise giving any
notice required by law. 48 Expressing a fear that the "tentative findings and conclusions arrived
at without the salutary safeguards applicable to all full scale trials on
the merits will be extremely prejudicial to one or the other of the part-
ties," 49 the court rejected this procedure as well. Judge Medina saw
other problems with the mini-hearing: First, it "does violence to the
whole concept of summary judgment"; 50 second, it "cannot be recon-
ciled with the requirement in Rule 23 that 'as soon as practicable after
the commencement of the action' the question of class suit vel non
be decided"; 51 and third, the procedure was invoked by the trial court
without jurisdiction. 52

Finally, the Eisen III court rejected the use of the fluid class re-
covery device. 53 The basis for this ruling is ambiguous, but the
Second Circuit clearly felt that Judge Tyler's authorization of fluid
class recovery was unsupported by valid precedent. 54 Judge Tyler
cited the settlement of the Drug Cases 55 as one "respectable prece-
dent," but this was distinguished by the Second Circuit on the grounds
that procedures appropriate to a "consensual affair" are ill-fitted to
the solution of problems where every issue is "contested and litiga-
ted." 56 Judge Tyler's reliance on Bebchick v. Public Utilities Com-
mision 57 was held to be inappropriate because Bebchick was not a
class action and because the victims of the unlawful rate increase by
the public utility could not have been identified. 58 Finally, Daar v.
Yellow Cab Co., 59 a state class action case relied on by Judge Tyler,
was distinguished on the ground that it involved a state class action
statute unlike Rule 23 and because its procedural stance was different
from that in Eisen. 60

48. Id. at 1015.
49. Id.
50. Id. at 1016.
51. Id.
52. Id.
53. Id. at 1017-18.
54. Id. at 1012. For a discussion of the ambiguous nature of the basis for this
holding see text accompanying notes 189-206 infra.
referred to as The Drug Cases).
56. 479 F.2d at 1012.
58. 479 F.2d at 1012.
60. 479 F.2d at 1012. The treatment of the Daar decision by the Second Circuit
is examined more closely below. See text accompanying notes 201-06 infra.
After the *Eisen III* decision, the Second Circuit denied a petition for a rehearing en banc over a sharp dissent by Judge Oakes.61 Certiorari has been granted by the United States Supreme Court and a decision can be expected at an early date.62 In its order, however, the Court requested the parties to brief and argue the jurisdiction of the Court of Appeals. This is a reference to the conclusion of the Second Circuit in the “death-knell” opinion that the original denial of the suit on a class basis was appealable. The Court may choose to avoid the issues outlined in this article by concluding that the “death-knell” doctrine is invalid, and that *Eisen II* and *Eisen III* therefore were decided without jurisdiction.63 Should the Court elect to follow such a course, it may well be years before these important issues are finally resolved.

C. Important Theories Ignored in the Eisen III Decision

1. The Therapeutic Benefits Theory of Class Actions

   (a) The Lawyer's Rationale

   Occasionally “mass wrong” class actions have been justified by

61. 479 F.2d at 1021-26 (Oakes, J., dissenting).
63. There is one other possible route by which the Supreme Court might avoid a resolution of these issues. The Court could uphold the validity of the death-knell doctrine, and thus confirm the jurisdiction of the Second Circuit in *Eisen II* (in which the court was reviewing an order denying the maintenance of a class action), but rule that *Eisen III* (wherein the court reviewed an order granting the maintenance of a class action) was decided without jurisdiction. This result would be reached via the following analysis: A denial of a class action, while not an adjudication on the merits, is an appealable order because, since the only feasible way of prosecuting the action is on a class basis, to strike the class allegations will effectively end the action. Thus the court in *Eisen II* had jurisdiction to review Judge Tyler's initial denial of the class action. However, the allowance of a class action does not effectively put an end to the litigation, and thus is not an appealable order. Therefore, *Eisen III* was decided without jurisdiction, and a final determination of the propriety of the class action must await an adjudication of the merits of the case and an appeal therefrom. Such a result might appeal to the Court as a convenient means of letting important class action issues "ripen" while allowing the clearly correct death-knell doctrine to stand.

To its great credit, the Supreme Court rejected this “possible rout” which would have enabled it to avoid resolving certain of the issues presented in *Eisen III* in rendering its decision on May 28, 1974. See the citation to the Supreme Court's opinion at note 14, supra, and detailed discussion of the Supreme Court's decision in the Author's Note, following footnote 206 at page 1405, infra. The Supreme Court took the view that the District Court's allocation of 90 percent of the notice costs to the defendants constituted a final determination of a claim of right separate from, and collateral to, rights asserted in the action. Therefore the allocation decision was properly reviewable by federal appellate courts under 28 U.S.C. 1291. See 42 U.S.L.W. 4808-4809.
theories that the courts and litigants will save time and money.\textsuperscript{64} Such theories are premised, however, on the idea that a large number of small suits will be brought by the damaged members of the class \textit{unless} a class action procedure is allowed. The premise, in the usual mass wrong situation is, at a minimum, very questionable. As is well known to the defendant and, one suspects, to the court and to the attorney for the plaintiff class, the individual members of the class will not, in any appreciable numbers, bring individual lawsuits.\textsuperscript{65} Furthermore, as experience has taught all involved, class actions are elaborate and time consuming cases. Thus, in mass wrong situations, the amount of court and lawyer time consumed will actually be greater if class action treatment is allowed than will be consumed by the aggregate of all the realistically predictable individual suits.\textsuperscript{66}

Another, and more realistic, justification for class actions which has been advanced is that through the device of a class action more wronged individual members of the class will receive compensation than if the class members are forced to sue individually.\textsuperscript{67} This theory recognizes the fact that litigation is a time consuming and expensive process from which mass wrong victims are foreclosed through economic considerations even if the assumption is made that the victims are aware of the existence of the wrong, an assumption which is inaccurate in the usual mass wrong situation.\textsuperscript{68}


\textsuperscript{65} The vast majority of the members of the class will often never become aware of the fact that they have been injured or the fact that they may bring an action for individual redress. More importantly, the economic value of the redress obtainable is usually far less than the value of the time and effort the consumer would have to expend in prosecuting an individual suit.

\textsuperscript{66} For reasons already discussed, if no class action is allowed, it is unlikely that anyone will sue, and no court or lawyer time will be consumed. If a class action is permitted, however, a great deal of court and lawyer time will be consumed, primarily in the notice procedures of Rule 23 and in the discovery process. Thus in a mass wrong situation, a class action will require greater court and lawyer time than will the aggregate of the non existent (or negligible) number of alternative individual suits.

\textsuperscript{67} See Daar v. Yellow Cab Co., 67 Cal. 2d 695, 715, 433 P.2d 732, 746, 63 Cal. Rptr. 724, 738 (1967).

\textsuperscript{68} The assumption is inaccurate because the wrongful conduct is frequently highly complex. Mass fraud is often accomplished by means of subtle and technical devices, such as the tampering with taxicab meters alleged in Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967). Another dimensions of complexity may be added by the involvement of regulatory agencies, such as the Public Utilities Commission, in \textit{Daar}, the Securities and Exchange Commission, in \textit{Eisen}, and the Patent Office, in West Virginia v. Charles Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d Cir.), \textit{cert. denied}, 404 U.S. 871 (1971). Similar problems may be posed by the presence of self-regulatory bodies such as the
There are, however, numerous situations in which the theory of increasing the number of compensated victims is either not applicable or its effect is minimal. This is the case in those mass wrong situations in which the victims cannot be identified individually for purposes of disbursing compensation to them. When the possible class contains large numbers of unidentifiable members, the most realistic and persuasive argument for mass wrong class actions which can be advanced is the "therapeutic benefits" theory of class actions.

The following excerpt is a succinct statement of the simple idea behind the theory:

The value of class actions, albeit reward-inspired, has been repeatedly established in recent decades by shareholders' suits. They are therapeutic, helping to maintain the health of our corporate system. In hundreds of suits which would not have been instituted without the allure of generous compensations, a miscarriage of justice has been prevented. At the same time the record

New York Stock Exchange, again exemplified by Eisen. Finally, in the majority of mass wrong situations which have given rise to reported decisions, the wrong results from violations of the federal antitrust laws. Antitrust cases are notorious for the complexity and proof problems which they invariably entail. Here again, Eisen and Pfizer, both of which involve allegations of price-fixing, are illustrative.

Even assuming knowledge of the wrong, economic considerations will effectively foreclose individual suits due to the insignificant money damages suffered by individual victims. Judge Medina estimates at one point that the average individual injury in Eisen was $3.90. Eisen is typical in this respect. No mass wrong class action is known to the author in which the injuries suffered by individual class members would not have been far outstripped by the counsel fees necessary to prove the claim.

Thus it is clear that ignorance of the injury is not the prime obstacle to vindication of individual injuries suffered in mass wrong situations. Nor will awareness of the injury overcome the true obstacle: that "no lawyer of competence" is going to undertake complex litigation on a contingency basis when the claimed damages are insubstantial; and no victim of a $50 injury will be willing, even in the unlikely event that he is able, to pay a sufficient retainer to justify counsel's undertaking such litigation.


of litigated cases is prophylactic—a deterrent to the future wrong-doer. Every successful suit duly rewarded encourages other suits to redress misconduct and by the same token discourages misconduct which would occasion suit. There can be no doubt that these derivative suits have materially raised the standards of fiduciary relationships and other economic behavior.\textsuperscript{70}

The same idea has been expressed by courts many times to justify a willingness to enlarge the prize, or judgment, obtainable through private rights of action which have strong collateral public benefits, thus providing an increased incentive for the pursuit of these private remedies. The view is that such private remedies should be encouraged, and thus that they should be made attractive, and obstacles to their use minimized.

The Supreme Court has recognized "therapeutics" as a legitimate factor in considering the judicial expansion of private remedies for violations of a statute. In \textit{J. I. Case Co. v. Borak},\textsuperscript{71} the Court found an implied private right of action in the Securities Exchange Act of 1934 despite the absence of any such provision in the Act itself, stating:

Private enforcement of the proxy rules provides a necessary supplement to Commission action. As in anti-trust treble damage litigation, the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements. The Commission advises that it examines over 2,000 proxy statements annually and each of them must necessarily be expedited. Time does not permit an independent examination of the facts set out in the proxy material and this results in the Commission's acceptance of the representations contained therein at their face value unless contrary to other material on file with it.

We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.\textsuperscript{72}

Another example of the use of therapeutics as a rationale for enhancing the attractiveness of certain private actions is the "private attorney general" concept as a basis for awarding attorneys' fees to successful plaintiffs in certain actions affected with a public interest. An extensive analysis of this concept appears in \textit{La Raza Unida v. Volpe},\textsuperscript{73} where it is described as follows:

\begin{quote}
[W]henever there is nothing in the statutory scheme [under which
\end{quote}

\textsuperscript{71.} 377 U.S. 426 (1964).
\textsuperscript{72.} \textit{id}. at 432.
\textsuperscript{73.} 57 F.R.D. 94 (N.D. Cal. 1972).
the action is brought] which might be interpreted as precluding it, a "private attorney-general" should be awarded attorneys' fees when he has effectuated a strong Congressional policy which has benefited a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential.\[^74\]

The case involved a victorious suit to enjoin the construction of a highway with federal funds when federal requirements regarding studies of environmental impact and relocation of displaced residents had not been complied with. Due, among other things, to the effectuation of Congressional policies which the suit furthered, the court awarded attorneys' fees to plaintiffs on the theory that they had acted as private attorneys general.

While the discussions of therapeutics in *J. I. Case Co. v. Borak* and *La Raza Unida v. Volpe* do not concern the maintenance of a class action, these discussions do illustrate an increasingly prevalent judicial tendency to resolve important legal questions with a strong concern for the effect of the resolution of the question upon the incentives for future private actions which have a therapeutic benefit. The strongest judicial emphasis on therapeutics as a basis for a liberal construction of Rule 23 is seen in *Dolgow v. Anderson*,\[^75\] a decision which received harsh treatment from Judge Medina in *Eisen III*.\[^76\] *Dolgow* was commenced as a class action alleging certain violations of the securities laws. At an early stage of the litigation, District Judge Weinstein responded to defendant's motion to dismiss the class action by stressing that: "The Rule 23 class action as a way of redressing group wrongs is a semi-public remedy administered by the lawyer in private practice—a cross between administrative action and private litigation."\[^77\]

Citing a wide variety of authority, Judge Weinstein noted that shareholder class suits are "a primary means of enforcing desired standards of conduct on the part of corporate officials,"\[^78\] that without class actions there would be little practical check on betrayal of shareholder interests by directors,\[^79\] and that the provisions of the Securities

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\[^74\] Id. at 98.
\[^75\] 43 F.R.D. 472 (E.D.N.Y. 1968).
\[^76\] "Of the few District Court decisions on the point [of a preliminary hearing on the merits] most of these disagree ... with the innovations described in *Dolgow*, and there is little to commend the reasoning or lack of reasoning in the others." 479 F.2d at 1016.
\[^78\] 43 F.R.D. at 486.
\[^79\] Id.
Act for civil liability are calculated to be largely preventive rather than redressive.\textsuperscript{80}

In a number of other decisions, the same attitude and decisive effect of therapeutic benefit considerations is seen. In \textit{Esplin v. Hirschi},\textsuperscript{81} in which a class action under the Securities Exchange Act was permitted, the court stated:

\[\text{T}aking the issue in the context of the securities laws and realizing that "the ultimate effectiveness of federal remedies . . . may depend in large measure on the applicability of the class action device," the interests of justice require that in a doubtful case . . . any error if there is to be one, should be committed in favor of allowing the class action.\textsuperscript{82}\]

Similar sentiments appear in the California Supreme Court opinion in \textit{Daar v. Yellow Cab Co.}:\textsuperscript{83}

\[\text{A}bsent a class suit, recovery by any of the individual taxicab users is unlikely. The complaint alleges that there is a relatively small loss to each individual class member. In such a case separate actions would be economically unfeasible. . . . It is more likely that, absent a class suit, defendant will retain the benefits from its alleged wrongs. A procedure that would permit the allegedly injured parties to recover the amount of their overpayments is to be preferred over the foregoing alternative.\textsuperscript{84}\]

The therapeutic benefits theory of class actions is a traditional type of lawyer conceived rationale, simple in its statement yet quite compelling. It appeals to the taxpayer in all of us because of the saving of public monies which would otherwise have to be spent for effective enforcement of the statutes involved, assuming that effective enforcement is a desired goal.\textsuperscript{85} Finally, and most importantly, the sheer unanswerable morality of the notion that the wrongdoer should not be allowed to keep the spoil from his activity is forceful, to say the least.


\textsuperscript{81} 402 F.2d 94 (10th Cir. 1968).

\textsuperscript{82} \textit{Id.} at 101 (citations omitted).

\textsuperscript{83} 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

\textsuperscript{84} \textit{Id.} at 715, 433 P.2d at 746, 63 Cal. Rptr. at 738.

\textsuperscript{85} This assumption is not as self-evident as might be supposed. A number of state and federal criminal statutes are unenforced due to the exercise of prosecutorial discretion. In the case of obsolete or trivial statutes, an official decision not to prosecute is usually correct. Thus effective enforcement of criminal statutes is not invariably a desirable goal. This point carries with it the correlative idea that private enforcement of criminal statutes, through class actions or otherwise, should be subjected to some form of reasonable control, or, alternatively, the statute books should be pruned of undesirable criminal proscriptions. See R. Posner, \textit{Economic Analysis of Law} 373-79 (1973).
However comfortable the therapeutic benefits theory is to some judges and lawyers, it was unpersuasive in the extreme to Judge Medina. We can speculate that the Judge was perhaps reacting against what he viewed as excessively moralizing advocacy as he gave the theory short shrift in his opinion. But it is better to read the Judge's own words in this regard:

[S]tatements about "disgorging" sums of money for which a defendant may be liable, or the "prophylactic" effect of making the wrongdoer suffer the pains of retribution and generally about providing a remedy for the ills of mankind, do little to solve specific legal problems. The result of this approach is almost always confusion of thought and irrational, emotional and unsound decisions. . . . [N]one of these considerations justifies disregarding, nullifying or watering down any of the procedural safeguards established by the Constitution, or by Congressional mandate, or by the Federal Rules of Civil Procedure, including amended Rule 23. It is a historical fact that procedural safeguards for the benefit of all litigants constitute some of the most important and salutary protections against oppressions, including oppressions by those whose intentions may be above reproach.86

It will be argued hereafter that neither statutory nor constitutional requirements are as clear as Judge Medina appears to believe.87 Judge Oakes, in his dissent from the denial of the petition for an en banc hearing,88 calls the majority result "doubtful to say the least,"89 and expresses concern over the implications of the decision for class actions in general and their therapeutic benefits in particular. He states:

The panel opinion seems on its face to give a green light to monopolies and conglomerates who deal in quantity items selling at small prices to proceed to violate the antitrust laws, unham-

86. 479 F.2d at 1013.


88. 479 F.2d at 1021.

89. Id. at 1022.
pered by any realistic threat of private consumer civil proceedings, leaving it to some vague future act of Congress to protect the innocent consumer. The panel opinion as I read it tells polluters that they are pretty safe from class actions because even if a whole city is blanketed in smoke or its water supply contaminated, the plaintiffs can never advance the money for notices to, say, all the people in the city phone book, who certainly are identifiable.90

The color of the language used by both Judge Medina and Judge Oakes is indeed intense, and shows that reasonable men, even eminent and learned reasonable men, can differ over the issues raised in Eisen III. However, it is also abundantly clear that Judge Medina did not give the same type of consideration to the therapeutic benefits effect of the question before him as did the courts in numerous recent federal and state decisions.

(b) The Economics Involved

While an economist would be unmoved by the moralizing which often accompanies judicial statements of the therapeutic benefits theory of class actions, he would grant the validity of the basis of the theory. Indeed, the therapeutic benefits theory, used as a judicial rationale for permitting class suits which require a defendant to pay damages to the plaintiff class in an amount equal to the individual damages suffered by the class members,91 is implicitly based upon well-known economic concepts such as "external cost" (of a firm's business operations) and "internalization" (of those "external costs"). The economist credited with first stating the concept of external cost is the late Professor A. C. Pigou of Cambridge University. Pigou laid the foundation for a discussion of the external cost principle by the following observation:

[O]ne person A, in the course of rendering some service, for which payment is made, to a second person B, incidentally also renders services or disservices to other persons (not producers of like services), of such a sort that payment cannot be exacted from the benefited parties or compensation enforced on behalf of the injured parties.92

90. Id.
91. See text accompanying note 84 supra and notes 191-196 infra.
92. A. PIGOU, THE ECONOMICS OF WELFARE 183 (4th ed. 1932) (emphasis added). In the quotation and generally, Pigou discusses the ideas of both external benefits as well as external costs. For our purposes we shall examine only the latter concept since we are concerned with the mass wrong consumer abuse situation. Pigou also specifically refers to the "disservices" rendered to "other persons" implying persons other than B, to whom services are being rendered. We are, of course, concerned with "disservices" or external costs which are inflicted upon consumers who have a direct commercial relationship with the renderer of services (which is A in Pigou's example).
To illustrate, Pigou mentioned the instance of sparks from a cargo-hauling railroad engine setting fire to woods adjoining the track.\textsuperscript{93} Since at that time in Britain a railroad had no liability to adjacent landowners who suffered damage caused by sparks from an engine, Pigou viewed the loss which they suffered as an external cost, since members of society other than the producers of the goods or services\textsuperscript{94} would have to bear the cost of the damage to the trees, a cost generated and made necessary by the act of production. With the previously mentioned rules of liability of the jurisdiction at the time, the railroad did not have to “internalize” or take into account the cost of the spark damage to the woods in determining its most profitable level and method of doing business.

From the foregoing it would appear that once an “external cost” has been identified, the party who “caused” or generated the external cost should be forced to internalize it, and this was the implication generally attributed to Pigou by economists.\textsuperscript{95} However, this implication leads to an economically unsound conclusion in those situations in which placing the liability on the party who caused the damage, thereby compelling internalization of the cost, would result in a lower total output of goods and services by the entire society than would be the case if the “external cost” is allowed to remain the burden of persons other than the producer.\textsuperscript{96} Thus, the question of who should be assigned the legal liability for a particular cost of production can be both important and disputed. However, in the situation with which we are here concerned, a mass wrong consumer abuse accomplished, for example, by fraudulent advertising, the legal liability, at least in theory, is already established beyond debate. Thus, our concern is not who should bear the liability, but what is the economic effect of a new procedural device which would, as a practical matter, force the internalization of the otherwise external cost of the fraudulent adver-

\textsuperscript{93} See A. Pigou, Wealth and Welfare 129-30 n.35 (1912).

\textsuperscript{94} Pigou used the phrase “social cost” to refer to the total cost incurred by all members of the society (including the producer) by the specific act of production. Thus, Pigou included within “social cost” the “external cost” suffered by parties other than the producer as well as the “internal cost” incurred by the producer. Pigou used the phrase “private cost” synonymously with “internal cost.” Economists have used a variety of terms for these concepts. For example, external costs are referred to on occasion as “external diseconomies.” P. Samuelson, Economics 453-54 (8th ed. 1970).

\textsuperscript{95} See Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960).

\textsuperscript{96} See id. at 31-34.
tisement. The external cost of a fraudulent advertisement will consist, at least in part, of the defeated legitimate expectations of the consumers who rely upon the advertisement in making their purchases. In a minority of American jurisdictions, this cost in terms of the damages available to a plaintiff is measured by the difference between the price paid for the product by the purchasing consumers and the value of the product. In a majority of jurisdictions in this country, the cost is measured by the difference between the value of the product as falsely represented and the actual value of the product. For our purposes it is not important whether a jurisdiction follows the minority or majority rule of damages, nor is it important whether the damages recoverable for fraud equal the full extent of the external costs of a false advertisement. We are assuming a mass wrong situation in which the individual damages suffered by any measurement are too small to justify suit, but the aggregate damages suffered by the group are very large. Our sole concern is the economic effect of the adoption of a class action procedure which, as a practical matter, will enable the group to recover the aggregate damages from the false advertiser.

We can be sure that if a producer-advertiser knows that he will incur a massive judgment liability for the perpetration of a fraudulent advertisement, this prospect will be a relevant and significant consideration for him in determining whether or not to run such a fraudulent advertisement. The effect of the adoption in the relevant jurisdiction of an effective class action procedure applicable to mass wrong situations upon such considerations by a producer-advertiser is shown graphically in Figures 1 through 4 below.

In Figure 1 the horizontal axis represents the possible outputs which the producer-advertiser can produce, with the point at which the output axis intersects the vertical axis representing zero. Thus, the number of units of output on the output axis increases moving from left to right. The vertical axis represents the unit price which the producer-advertiser can charge for his product, with that price equalling zero at the point at which the price axis intersects the output axis. The possible unit prices which can be charged increases in an upward direction on the price axis. The line marked “D” is the demand “curve” and represents, at any given level of output, the unit price at which the public will buy all of the output produced by the producer-advertiser. Thus, at points on the upper left of the de-

98. Of course the relationship between output and price which is represented by
Fig. 1. Business Operations Before False Advertising.

mand curve the public will pay a high price for the producer's product because output is small, while at the lower right of the demand curve the public will only pay a low price for the product because the output is large. The line labelled "MR" is the marginal revenue curve which represents the total increase in revenue realized by the producer-advertiser by producing additional units. The line marked "ATC" is the average total cost curve, representing the total cost per unit incurred by the producer-advertiser in producing any given quantity of units. The line marked "MC" is the marginal cost curve which represents the change in the total cost incurred by the producer-advertiser with each additional unit which he chooses to produce.

The point at which the marginal cost and marginal revenue curves intersect establishes the quantity of production at which the rational producer-advertiser should cease producing units of his prod-

the demand curve can also be stated as showing, at any given unit price, the level of output of the product which will be demanded and purchased by the public.
uct. At any level of production after this point (to the right of the intersection of the curve) the marginal cost of an additional unit of production exceeds the marginal revenue to be obtained by producing and selling that unit and the producer-advertiser can only lose money by such action. The price at which the public will purchase all of the quantity produced at the optimum level of rational production can be established by drawing a straight line perpendicular to the output axis which passes through the intersection of the marginal cost and average total cost curves and continues upward to intersect with the demand curve. By connecting the point of this latter intersection with the price axis by a line which is perpendicular to the price axis (and horizontal to the output axis) the producer-advertiser can establish the unit price to charge for the optimum level of output. Having thus established the optimum output level, and the price at which each unit produced at that optimum level should be sold, the producer-advertiser can, by multiplying the two, determine the total revenue which he will obtain by producing at the optimum level of production. To establish the amount of profit which he will make at the optimum output, the producer need only connect the line which has been previously drawn perpendicular to the output axis and running through the intersection of the marginal revenue and marginal cost curve so that it intersects with the average total cost curve. By drawing a line perpendicular to the price axis (and horizontal to the output axis) connecting the point of the latter intersection to the price axis, the producer can know the price or cost he is paying for producing each unit at the optimum level of output. Multiplying this unit price or cost figure by the optimum output will yield the total cost of this production. Subtracting this total cost of the optimum level of output from the total revenues realizable by producing at the optimum level will yield the profit which the producer-advertiser can realize at the optimum level of production. In Figure 1 this profit is shown spatially as a shaded rectangle. For purposes of visualizing the effect upon profits by the internalization of the otherwise external cost of a fraudulent advertisement it is essential only that the reader be able to compare the size of the shaded profit areas in this Figure and Figures 3 and 4 below.

In Figure 2 we see what will happen to the demand and marginal revenue curves facing a producer-advertiser if he resorts to a successful fraudulent advertisement to stimulate demand for this product.99

99. The same effect may occur, of course, as the result of a successful non-fraud-
Fig. 2. Prospective Shift in Demand with False Advertising

The fraudulent advertisement stimulates the demand of the public for the producer- advertiser's product, and the public is now willing to pay a higher unit price for the product at any level of production chosen by the producer- advertiser. Thus, the demand curve shifts from the "old" position (shown by the dotted line marked "D") to the new position shown by the unbroken line labelled "D^2." This upward or rightward shift of the demand curve causes a similar upward or rightward shift in the marginal revenue curve. This is seen by comparing the position of the old marginal revenue curve, shown by a broken line labelled "MR" and the new marginal revenue curve shown by an unbroken line labelled "MR'."
Fig. 3. Prospective Business Operations with False Advertising—No Class Action Possible

In Figure 3 we see the effects of added expense, incurred in running the fraudulent advertisement, on the average total cost and the marginal cost curves. The figure also enables us to observe the expected profit picture which can be forecast by the producer-advertiser if there is no effective class action procedure available for forcing the producer-advertiser to internalize the external cost of the fraudulent advertisement. Since there is an expense involved in producing and running the fraudulent advertisement, we would expect the average total cost (which includes all the cost elements of producing and selling the product) to be increased at all levels of output. This is shown in Figure 3 by the upward shift from the old average total cost curve (shown as a broken line labelled "ATC") to the new average total cost curve which is shown by an unbroken line labelled "ATC'." With this upward shift to the new average total cost curve we see that the marginal cost curve is also shifted upward. This is shown in Figure 3 by comparing the old marginal cost curve (shown by a broken line
labelled "MC") with the position of the new marginal cost curve which is shown by an unbroken line labelled "MC2." The optimum level of production, the price at which that level of output can be sold to the public, the total revenues realizable at that level of output and the total cost incurred at that level of output are established in the same manner as was used in connection with Figure 1. We see now that the shaded profit area, representing the total profit which the producer-advertiser can expect to realize as a result of a successful fraudulent advertisement when he is not forced to internalize the external costs of the fraudulent advertisement is considerably larger than the shaded profit area in Figure 1.\textsuperscript{100}

Clearly a rational, but immoral, producer-advertiser on the basis of a comparison of the profit areas in Figures 3 and 1 would resort to the use of a false advertisement since his total profit would increase as the result. The changes in the profit area caused by the prospect of an effective class action procedure are shown in Figure 4.

In Figure 4 we see that the demand and marginal revenue curves ("D" and "MR") are unchanged from Figure 3 since the producer-advertiser could still expect the same shift in demand curve regardless of the fact that he now faces the prospect of an effective class action procedure being used by defrauded consumers. However, the average total cost and marginal cost curves are drastically shifted upward by the prospect of an effective class action. In Figure 4 the average total cost curve established in Figure 3 (shown by broken line labelled "ATC") is replaced by the new average total cost curve shown as the unbroken line labelled "ATC2." This upward shift logically results from the added prospect of effective class action procedure which permits the aggregation and recovery of all the defrauded consumer claims against him. Not only must the producer-advertiser reckon with the prospect of having to face a potential damage liability of large proportions but he must also include a calculation of the attendant legal expense he will incur in attempting to meet the class action as well as the detrimental effects of the adverse publicity which he will receive as the result of the filing and prosecution of the class action. With the dramatic upward shift of the average total cost curve we see a similarly dramatic shift upward of the marginal cost curve,

\textsuperscript{100} We have assumed that a relatively inexpensive fraudulent ad will produce a sharp shift in the demand curve in arriving at the attractive profit forecast. Such an assumption is reasonable in view of the fact that, freed of the restraints of truth, an advertiser should be able to construct the most effective and compelling advertisement possible.
Fig. 4. Prospective Business Operations with False Advertising—
Class Action Allowable

shown by the unbroken line labelled "MC^2" which replaces the marginal cost curve established in Figure 3 (shown in this figure by the broken line labelled "MC^1"). After establishing the optimum level of output, the price at which this level of output can be sold to the public and the total cost of producing the optimum level of output in the same manner used in reference to Figures 1 and 3, the advertiser-producer can derive the total profit which he can expect to realize by the false advertisement when it is run in a jurisdiction in which consumers can resort to an effective class action procedure. This total profit, which is again shown by the shaded rectangle, is no larger, and, depending upon specific facts, may be smaller than the profit which the producer-advertiser could realize without resort to running the false advertisement. (Compare the shaded areas in Figures 1 and 4.)^101 All that the advertiser-producer could accomplish by resorting

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101. The profit areas in Figures 1 and 4 are the same size or very close to the same size. However, it is not invariably the case that the increase in prospective costs
to the false advertisement is to raise the level of prices at which the
public will purchase his output (the shifting of the demand curve up-
ward or rightward) together with an increase in the average total cost,
including the calculation of the potential expense of a class action and
the attendant legal fees and adverse publicity, which he will incur at
any given level of output. Thus the only changes he will produce
in his business operation by resorting to the false advertisement is to
engage in transactions (selling his units and purchasing the inputs of
production) involving larger sums of money without changing his prof-
it prospect. A rational producer would therefore forego running the
false advertisement because he must internalize the otherwise external
cost of the false advertisement. In short, he will be deterred from
resorting to false advertising.

2. The Evolving Constitutional Right to Meaningfully
Participate in the Litigation Process

In a number of cases in the last twenty years, and in pursuance
of different constitutional theories, the United States Supreme Court
has established what the author perceives as a right of meaningful
access to the litigation forum secured to all U.S. citizens as part of
their constitutional birthright. While the exact contours and content
of this evolving right are not yet precisely established, it is clear that
one significant hallmark of the right is that is must be available to
a citizen as a practical, and not merely theoretical, matter. Another
established facet of the right is that if association for the purpose of
enforcement of individual rights through litigation is a practical neces-
sity then such association is also protected as part of the basic right.

We begin our exploration of this right to participate in the liti-
gation process by noting the obvious impracticality of the individual law-
suits which Judge Medina’s decision would require the members of
the purported class to undertake. The injury alleged in Eisen is a
classic example of a mass wrong with a substantial aggregate injury,
but minimal individual damage claims:

During the period May, 1962 through June, 1966, the “aver-
age shareholder” who had odd-lot transactions in stocks listed on
the NYSE had approximately 5 such transactions . . . . The
average odd-lot differential per transaction during such period was
approximately $5.18.102

from running a false ad will exactly cancel out the increased future revenues. The
graphs are intended to illustrate, not quantify, the basic idea that the forced internali-
ization of the fraud damage cost of consumers will alter the economic attractiveness of
a fraudulent advertisement to a producer-advertiser.

102. 52 F.R.D. at 257.
Thus, the average odd-lot differential paid by each class member was $25.90. Assuming, as did Judge Tyler, that 5 percent of the odd-lot differential resulted from defendants' alleged antitrust activities,\(^{103}\) the damage suffered by the average class member would have been approximately $1.30. Even allowing for trebling of damage claims provided under the antitrust laws, individual claims would still have averaged only $3.90.\(^{104}\) The futility of individual suits to recover such miniscule sums is clear without comment.

Problems such as this served as part of the impetus for the creation of the equitable class action procedure.\(^{105}\) The impetus proceeded from a recognition that, without it, legal relief to a small claimant with a complex cause of action would be an impossibility. Thus, it has been observed that "the historic mission of the class action is to help the smaller guy."\(^{106}\) Similar concerns produced the independent growth of two related constitutional concepts which have unrealized potential in consideration of class action questions: (1) the right of meaningful access to the courts,\(^{107}\) and (2) the right to associate for purposes of litigation.\(^{108}\) The common concern of these concepts is apparent, but their origins are entirely distinct and thus call for separate treatment.

(a) The Basic Right to Litigate

In *Boddie v. Connecticut*,\(^ {109}\) decided in 1971, the Supreme Court held that the due process clause prohibited a state from denying an indigent couple seeking a divorce access to its courts by requiring the payment of court fees. Justice Harlan, writing for the majority, analogized the position of petitioners in *Boddie* to that normally occupied by a defendant. He reasoned that since the only means for obtaining a divorce was by recourse to the courts, the couple seeking a divorce is, like every defendant, reduced to a position in which "the judicial proceeding becomes the only effective means of resolving

103. Judge Tyler assumed the 5 percent figure for "purposes of establishing a minimum on potential damages," noting that Eisen's $70 claim was predicated upon an alleged illegal overcharge of 27 percent. *Id.* at 265 n.8.
104. These computations also appear in *Eisen III*, 479 F.2d at 1010.
105. See Z. CHAFFEE, SOME PROBLEMS OF EQUITY (1950).
107. See text accompanying notes 109-26 infra.
108. See text accompanying notes 127-37 infra.
the dispute . . . .” 110 It was, as viewed by the Court, as though a defendant who had been sued was refused permission to defend:

Resort to the judicial process by these plaintiffs [meaning divorcing marriage partners] is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one. In this posture we think that this appeal is properly to be resolved in light of the principles enunciated in our due process decisions that delimit rights of defendants compelled to litigate their differences in the judicial forum. 111

Having adopted this perspective, the Court proceeded to evaluate the denial of relief in terms of its impact on two important principles, the constitutional requirement of a meaningful opportunity to be heard, and the special status of the marriage relationship in our society.

As to the former, Justice Harlan observed that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. 112

The court recognized in addition that imposition of court fees and costs on litigants was, in itself, unquestionably valid as a legitimate exercise of state power. 113 However, in this case the exercise of the power was declared invalid under the due process clause. Its exercise operated, as a practical matter, to curtail constitutional freedoms, and thus to that extent was invalid.

The concern of the Court over the effect of the denial on “the marriage relationship” is evidenced in a number of passages from the opinion:

As this Court on more than one occasion has recognized, marriage involves interests of basic importance in our society. It is not surprising, then, that the States have seen fit to oversee many aspects of that institution. Without a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts, for example, but we are unaware of any jurisdiction where private citizens may covenant for or dissolve marriage without state approval. 114

110. Id. at 376.
111. Id. at 376-77.
112. Id. at 377.
113. See id. at 379-80. “Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question.” Id. at 380.
114. Id. at 376 (citations omitted).
To further make the point that the type of proceeding involved was important to the outcome of the case the majority opinion continued:

We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship.115

The extent to which the Boddie decision hinges upon the special nature of the marriage relationship was and is a point of disagreement among the Supreme Court justices116 and commentators.117 Some believe that, regardless of the right asserted, access to the courts is always guaranteed by the due process clause.118 The late Justice Black, although initially hesitant, is representative of this view:

I dissented in Boddie v. Connecticut, 401 U.S. 371, 389 (1971), but now believe that if the decision in that case is to continue to be the law, it cannot and should not be restricted to persons seeking a divorce. It is bound to be expanded to all civil cases. Persons seeking a divorce are no different from other members of society who must resort to judicial process for resolution of their disputes. Consistent with the Equal Protection Clause of the Constitution, special favors cannot and should not be accorded to divorce litigants.119

In my view, the decision in Boddie v. Connecticut can safely rest on only one crucial foundation—that the civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to those courts . . . because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire an attorney.120

The view of Justice Black that the Boddie rationale applies with equal vigor to all types of legal proceedings was rejected by a majority

115. Id. at 382-83.
120. Id. at 955-56.
of the Supreme Court in *United States v. Kras.*\(^{121}\) The basic determination made in that opinion is that the *Boddie* rationale does not apply in the case of a person who desires adjudication as a bankrupt. More specifically the decision holds that there is no constitutionally protected right of access to the bankruptcy court. Therefore, an indigent who cannot pay the filing fees for a petition in bankruptcy can make no claim that his constitutional rights have been infringed. However, for two reasons, it does not follow that due to the *Kras* decision the only permissible reading of *Boddie* is that the right of access to the courts will be protected only when the substantive right asserted enjoys a special status similar to divorce actions.

First, a comparison of the language of *Boddie* with the facts of *Kras* suggests that, of the two decisions, *Kras* is more likely to be limited to its facts. In the passage from *Boddie* quoted above, the majority speaks of the right to a meaningful opportunity to be heard as to “claims of right and duty,”\(^{122}\) or, in other words, to participate in litigation with another. *Kras*, however, involved a bankruptcy proceeding, not litigation with an adverse party. There is an obvious distinction between the usual legal action by which a party seeks to enforce a claim to redress a wrong inflicted upon him by another, and a procedure in which a petitioner seeks to obtain an order allowing him to escape valid legal claims. In this sense, bankruptcy is fundamentally unlike other kinds of legal proceedings. Under this interpretation, the most expansive readings of *Boddie* may be left almost totally undisturbed by the *Kras* case.\(^{123}\)

Second, the basis upon which the *Boddie* decision distinguishes an apparently hostile prior holding strongly suggests that *Boddie* was not grounded upon the special status of divorce. In *Cohen v. Beneficial Industrial Loan Corp.*\(^{124}\) the Supreme Court had upheld a state requirement that a shareholder prosecuting a derivative action put up

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122. 401 U.S. at 377.
123. While it is the author's contention that, as indicated, *Kras* can be distinguished from *Boddie* it is clear that a number of general statements in the cases conflict. One can expect that lower courts will have to concern themselves with the extent of these conflicts in cases in which one of the parties will argue that a constitutionally protected right to litigate a particular type of cause of action or claim falls under the *Boddie* rationale. The extent to which *Boddie* may be curtailed by *Kras* will be ascertained only over time, as a succession of such cases, involving different substantive claims, find their way to the Supreme Court. The contention made here is that the logical result of this process should be the limitation of *Kras* to its facts, with minimal disturbance to the principles stated in *Boddie*.
security for defendant's expenses and, if unsuccessful, pay those expenses. The Court, noting that a corporation is an artificial entity, existing only at the indulgence of the state, held that the "Constitution does not oblige the state to place its litigating and adjudicating processes at the disposal of such a representative . . . ."125 In Boddie, defendant, relying upon the Cohen decision, argued that a reasonable fee requirement imposed on litigants in any action was constitutionally permissible. The Supreme Court could easily have distinguished Cohen on the ground that divorce actions are special as they relate to a basic human relationship in our society and are to be viewed differently from all other legal actions. Had it done so, it would be clear that the crucial point in Boddie was not the importance of access to the courts, but the importance of marriage and the procedure for its dissolution. The Court, however, specifically rested its distinction of Cohen on other grounds:

We think [Cohen] has no bearing on this case. Differences between divorce actions and derivative actions aside, unlike Cohen, where we considered merely a statute on its face, the application of this statute here operates to cut off entirely access to the courts.126

This statement indicates a fear that to distinguish Cohen purely on the grounds that divorce actions and derivative actions are different would suggest that access to the courts is important only in divorce cases. The wording of the statement appears carefully calculated to avoid this suggestion, and thus by implication to suggest that the linchpin of the decision was the denial of access to the courts, and not the special status of domestic relations.

Thus to the Boddie court the key distinction between Cohen and the case before it appears to be that in Cohen there was a moneyed plaintiff who was able, but refused, to post bond, while Boddie involved an indigent plaintiff who was unable to pay the costs. The bond requirement in Cohen made access to the courts more costly, but did not preclude it entirely, whereas in Boddie the fee requirement, as a practical matters, foreclosed access to litigation. Thus the Court's approach to the Cohen decision indicates that where litigation involving claims of rights and duties of natural persons is involved, the extent of practical foreclosure of the plaintiff from the litigation process is the crucial fact which determines the application of the due process clause, and the specific type of legal action brought is irrelevant.

125. Id. at 549-50.
126. 401 U.S. at 381 n.9.
While the effect of *Kras* upon *Boddie* and the full implications of *Boddie's* treatment of *Cohen* may be subjects of controversy, one thing remains clear. That is that the *Boddie* decision recognizes and stresses the extreme importance of practical access to the courts for those whose claims of right and duty cannot otherwise be resolved. Whether access to the courts is a constitutionally protected right may depend upon the nature of the right asserted, but in every case, at a minimum, a strong policy exists in favor of affording practical access to the litigation forum.

**(b) The Right to Associate to Litigate**

Markedly similar concerns have given rise to a parallel development in the area of First Amendment rights. During the early period of the civil rights movement it was apparent that few individual victims of racial discrimination were capable of financing litigation to secure judicial relief. This fact prompted the formation of, and reliance upon, organizations for the purpose of pooling resources and communicating information concerning the extent of minority group rights and the availability of legal redress. Claiming the purpose of maintaining high ethical standards in the legal profession, various state legislatures passed statutes ostensibly aimed at tighter control of the solicitation of legal claims and the unauthorized practice of law by laymen. Law enforcement agencies were quick to enforce the new legislation against various civil rights groups.

In these prosecutions, the defendant civil rights groups argued that the statutes were unconstitutional, and the issue was presented to the United States Supreme Court in 1963 in the case of *NAACP v. Button.*

The Virginia state statute involved in the case prohibited lawyers from soliciting legal claims. The defendants, relying upon the earlier decision in *NAACP v. Alabama,* argued that the statute infringed the right of the NAACP and its members and lawyers to associate for the purpose of assisting persons to seek legal redress for deprivation of constitutional rights. In response, the state of Virginia

128. 357 U.S. 449 (1958). In that case, the Supreme Court recognized a right of association to advocate public and private points of view, and reversed a contempt order granted under a state statute which required foreign corporations to file corporate charters and designate agents for service of process. The state court's order required the NAACP to produce records and papers, including membership lists. The NAACP refused to comply and was held in contempt. The Supreme Court reversed the contempt judgment and held that absent a compelling state interest the members' First and Fourteenth Amendments rights were paramount.
argued that the court decree, issued under the statute, did not purport to prohibit all litigation by the NAACP. Thus the NAACP's right to seek vindication by litigation had not been infringed.

The Supreme Court decided for the defendants, holding that the First Amendment right of association to advance "beliefs and ideas" included the right of association for purposes of litigation as well. Accordingly, any federal or state action which has the effect of curtailing such rights can be sustained only upon a showing of powerful countervailing interests by the state. The Court expressly recognized that effective litigation was dependent upon the ability to associate to pursue it, stating:

As construed by the [Virginia] Court, Chapter 33, at least potentially, prohibits every cooperative activity that would make advocacy of litigation meaningful. If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights. Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.

Justice Harlan, who dissented in the case on the ground that he attached greater weight to the claimed state interest, had no quarrel with the principles of the majority decision. On this point, he stated:

Freedom of expression embraces more than the right of an individual to speak his mind. It includes also his right to advocate and his right to join with his fellows in an effort to make that advocacy effective. And just as it includes the right jointly to petition the legislature for redress of grievances, so it must include the right to join together for purposes of obtaining legal redress. We have passed the point where litigation is regarded as an evil that must be avoided if some accommodation short of a lawsuit can be worked out. Litigation is often the desirable, and orderly way of resolving disputes of broad public significance and of obtaining vindication of fundamental rights.

In Button the Supreme Court recognized that the right of an aggrieved individual to sue can be no more than an empty boast in a number of not uncommon situations. When the victim of a legal wrong is ignorant, impecunious, or his claim financially insubstantial, suit is, for all practical purposes, impossible. When people associate,

129. The fundamental rights of the First Amendment are, of course, incorporated in the due process clause of the Fourteenth Amendment and thereby protected from infringement by the laws and actions of state and local government. See, e.g., Gitlow v. New York, 268 U.S. 652, 666 (1925).
130. 371 U.S. at 437-38 (citations omitted).
131. Id. at 452-53 (Harlan, J., dissenting (citations omitted).
however, to pool resources and information, the situation is drastically changed. The Court recognized, in short, a right of access to the courts and the further right to associate for the purpose of litigation if such association is the only means of securing such meaningful access. In those situations where it is vital to securing meaningful access to the courts, such association is a matter of right protected by the First Amendment.132

Subsequent decisions have taken the view that the right to associate to meaningfully participate in the litigation process is to be given a broad scope and cannot be limited by fine distinctions. Thus, it is immaterial whether the right asserted through litigation is of federal or state origin.133 Likewise it is immaterial whether the group involved referred its members to private attorneys, or actually employed the attorneys itself on a salary basis.134 Even more significantly, the Court has clarified the point that the crucial First Amendment activity is the right to associate for purposes of litigation, regardless of the nature of the right sought to be advanced by litigation. In Button the Court went to some lengths to characterize the litigation itself as a form of political expression. However, in United Mine Workers v. Illinois State Bar Associations,135 in 1967, the Supreme Court expressly stated that the protected right includes association for the purpose of effectively prosecuting the most mundane of statutory claims. In that case the group had employed attorneys for the purpose of assisting its members in the prosecution of workmen’s compensation claims.

As is the case with other fundamental rights, when a statute is found to inhibit the constitutionally guaranteed right to associate for purposes of litigation, the claim that the statute is an honest legislative attempt to solve a bona fide state problem is unavailing. It makes no difference that inhibition of the right is only an “incidental effect” of the statute—its constitutional infirmity remains. As stated in United Mine Workers v. Illinois State Bar Association:

[B]road rules framed to protect the public and to preserve respect for the administration of justice can in their actual operation significantly impair the value of associational freedoms. Thus, in Button . . . [w]e held the dangers of baseless litigation and conflicting interests between the association and individual litigants far too speculative to justify the broad remedy invoked by

the State, a remedy that would have seriously crippled the efforts of the NAACP to vindicate the rights of its members in court.\textsuperscript{136}

These developments, \textit{Boddie's} right of access to the courts and \textit{Button's} right to meaningfully participate in the litigation process through association, have powerful implications for the consideration of class action procedures. In the vast majority of consumer class actions the nature of the wrong and the status of the plaintiffs render the prospect of individual suits as remote and unlikely as in \textit{NAACP v. Button} or the other cases mentioned. As in those cases, the only way to give meaning to the right to bring suit is to permit association for the purpose of litigation. Thus, it can be strongly argued that the right to associate for the purpose of litigation logically includes a right to participate in class actions if this is the only method by which the individual class members can, as a practical matter, gain access to the courts.\textsuperscript{137} One consequence of this argument is that impediments to class action procedures, whether of statutory, judicial or constitutional origin, should be appraised with conscious regard for their inhibitory effect upon the right to associate to litigate which enjoys the status of a fundamental liberty protected by the First Amendment.

D. Analyzing the Three Critical Holdings of the Eisen III Decision

1. Individual Notice and the Requirements of Rule 23(c)(2)

Once plaintiff has made the four basic showings prerequisite to a class action,\textsuperscript{138} he may maintain the action on a class basis only by additionally satisfying at least one in a second series of requirements set forth in either Rule 23(b)(1), 23(b)(2) or 23(b)(3).\textsuperscript{139}

\begin{itemize}
\item \textsuperscript{136} \textit{Id.} at 222-23.
\item \textsuperscript{137} A possible rebuttal to this argument is that the right of association developed in the \textit{Button} line of cases involved \textit{voluntary} association, while in mass wrong class actions, most of the class members neither voluntarily join the class nor know of the existence of the litigation. However, assuming that the wrong is proved, and that litigation costs preclude individual suits, a presumption that victims \textit{would} join the class if they knew of the wrong does not seem unwarranted. A court's conclusion that the representative plaintiff adequately represents the interests and desires of the class, coupled with the fact that the named party does voluntarily associate with the class, gives additional support to this "presumption of volition."
\item \textsuperscript{138} \textsc{Fed. R. Civ. P.} 23(a): "Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."
\item \textsuperscript{139} \textsc{Fed. R. Civ. P.} 23(b): "Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and
In the majority of damage actions, the (b)(1) and (b)(2) routes will be unavailable, and plaintiff must them meet the requirements of (b)(3). The requirements for the notice which a plaintiff must give to other members of the class which he hopes to represent in an action maintained under Rule 23(b)(3) are set out in 23(c)(2) as follows:

In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort . . . .

in addition:
(1) the prosecution of separate actions by or against individual members of the class would create a risk of
   (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
   (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of class action.

140. In Eisen II, Judge Medina discussed the inapplicability of (b)(1) and (b)(2): "Subsection (b)(1)(A) authorizes a class action if 'the prosecution of separate actions by or against individual members would create a risk of * * * inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.' Plaintiff has effectively rebutted his own argument [that (b)(1)(A) applies] because he admits that individual actions could not be brought as the small claimants who constitute the entire class could not, on an individual basis, afford the expense of lengthy antitrust litigation. Under these circumstances there is little danger that individual suits will establish 'incompatible standards of conduct' for the defendants. Subsection (b)(2) was never intended to cover cases like the instant one where the primary claim is for damages, but is only applicable where the relief sought is exclusively or predominantly injunctive or declaratory." 391 F.2d at 564.

For further discussion and comparison of 23(b)(1), (b)(2) and (b)(3), see Proposed Rules of Civil Procedure, 39 F.R.D. 69, 100-04 (1966) (Advisory Committee's Notes, Rule 23).

The purpose of this notice is to permit potential class members to "opt-out" of the class and thereby to avoid the res judicata effect which would otherwise attach to a final judgment in an action prosecuted under (b)(3).142

Rule 23(c)(2) directs "individual notice to all members who can be identified through reasonable effort" in a 23(b)(3) class action. The district court in Eisen found that the names and addresses of approximately two million class members could be identified with reasonable effort143 but, as noted above, directed actual notice to only a very small proportion of the identifiable group and ordered published notice to the rest.

In reversing the district court's holding, Judge Medina ruled that subsection (c)(2) gives a trial judge no discretion on the form of notice in those situations where the identities of some or all of the absentee class members can, through reasonable efforts, be ascertained. In such cases, in Judge Medina's view, individual notice must be sent. In the case before him, some two million class members could be identified from defendant's records, and thus individual notice was required for all two million. The judge also stated, "this phase of amended Rule 23 has decided constitutional overtones"144 indicating a belief that a court would be unable to give (c)(2) a flexible interpretation even if it thought the statutory language would permit it.

Thus Judge Medina's ruling on the notice question has two facets: (1) his implied belief that Rule 23(c)(2) as written states a constitutional standard;145 and (2) his holding that the language of the rule clearly and unambiguously requires actual notice to all identifiable members in all cases, regardless of the difficulty of providing such notice.146 These two problems will now be discussed in the order stated.

(a) Constitutional Notice Requirements

Whether the Constitution requires individual notice in (b)(3)
type class actions has been debated since Rule 23 was promulgated. Judge Medina holds the view that (c)(2) does embody a due process requirement that no person can be bound by the results of a court action if that person (1) was identifiable at the time of the action and (2) did not receive individual notice of the action.

Such a view must logically be based upon the premise that if individual notice of the court action is received by the person involved, that person will take the requisite action to protect his interests, either withdrawing from or continuing in the litigation. This premise appears valid in reference to the traditional concept of civil litigation as being a contest between legally aware and financially highly motivated parties. However, in the mass wrong consumer class action, the members of the plaintiff class are almost certain to be neither aware of their rights nor, individually, financially highly motivated. To specify the requirements of the due process clause on the basis of an abstract, ideal concept while ignoring the realities of the situation before the court is a basic and grievous error in Judge Medina’s thinking. As will be discussed, this basic error leads to a number of inaccurate conclusions.

In contrast to Judge Medina’s view, the strong consensus among commentators is that the notice requirements of due process, as articulated in Hansberry v. Lee and Mullane v. Central Hanover Bank & Trust Co. are exceeded by the literal language of Rule 23, and that the drafters misread Mullane and Hansberry by failing to take into account the factual peculiarities and certain key passages in those cases.

147. Most frequently cited for the proposition that individual notice is a constitutional requirement is Proposed Rules of Civil Procedure, 39 F.R.D. 69, 107 (Advisory Committee’s Notes).


148. 479 F.2d at 1015. The Notes of the Advisory Committee with respect to the 1966 amendments of Rule 23 are in apparent accord. 39 F.R.D. 69, 106-107 (1966).

149. 311 U.S. 32 (1940).


151. See Maraist & Sharp, Federal Procedure’s Troubled Marriage: Due Process and the Class Action, 49 Texas L. Rev. 1 (1970); Pomerantz, The “Notice to the
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Mullane involved a judicial settlement of a “common trust fund” (a statutory device whereby a multitude of small private trusts may be consolidated under one trustee to achieve economies of administration) in which the only notice given to all beneficiaries, known or unknown, actual or potential, was by publication. The statute authorizing such notice was held to deny due process to “known beneficiaries whose whereabouts are also known . . . .” The arguments that a strict reading of the language of (c) (2) is not compelled by Mullane are: (1) The Mullane court itself disclaims any intent to establish a rigid rule applicable in all cases; (2) In Mullane the trustee was in regular communication with the beneficiaries, so that the giving of notice was cheap and easy; (3) In Mullane the interests of the various beneficiaries were distinctly adverse to one another, so that lack of notice created a real danger of inadequate representation; (4) Mullane involved a relatively small number of beneficiaries (only 113 trusts were involved); and (5) The interests of the beneficiaries in Mullane were quantitatively of a substantial nature, unlike the majority of class actions of which Eisen’s diminutive seventy dollar claim is typical.

Furthermore, it has been noted that the Mullane court adopted a “balancing” approach, weighing “the interests of the State in bring-


152. 339 U.S. at 309.
153. Id. at 320.
154. The Mullane Court states: “The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents.” Id. at 314. For a thorough analysis of these arguments and an excellent discussion of this topic in general, see Note, Managing the Large Class Action: Eisen v. Carlisle & Jacquelin, 87 HARV. L. REV. 426, 433-41 (1973).

155. 339 U.S. at 318.
156. See id. at 310.
157. Id. at 309.
158. The 113 trusts in Mullane contained an aggregate gross capital of almost $3,000,000. Id. The trusts averaged, therefore, approximately $26,500 in capital.
ing any issues to a final settlement and the interests of those involved in the action in receiving notice." In the class action context, this would involve balancing the interests of society in permitting a final resolution of claims of mass fraud or similar large-scale wrongs and the interests of individual class member victims in receiving opt-out notice. While in the traditional civil litigation situation the interests of the parties in receiving such a court notice would indeed be substantial, such is not the case for members of the plaintiff class in a mass wrong consumer suit. The interests of such class members in receiving individual notice will generally be nil. From a realistic economic standpoint, separate individual lawsuits are totally unfeasible; therefore, "opting out" is not a viable alternative. The interest of society, however, in resolving allegations of mass fraud and the like is great indeed, due to the therapeutic benefits of such suits mentioned above. Thus, the establishment in Eisen III of severe due process requirements is misconceived as a matter of the constitutional requirements established in Mullane.

159. Note, Managing the Large Class Action: Eisen v. Carlisle & Jacquelin, 87 Harv. L. Rev. 426, 434 (1973). This view is entirely sustainable from the language of the case:

"Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any proceeding. But the vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified.

Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that 'the fundamental requisite of due process of law is the opportunity to be heard.' This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding." 339 U.S. at 313-14 (citations omitted).

160. Judge Medina acknowledges that Mullane expressly sanctions published notice in certain circumstances but contends that the Mullane rule was "refined" by the following language in Schroeder v. City of New York, 371 U.S. 208, 212-13 (1962). "The general rule that emerges from the Mullane case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." 479 F.2d at 1017 n.21.

Judge Medina's reference to Schroeder does not reveal that Schroeder was an eminent domain case in which lack of individual notice worked a substantial forfeiture of the plaintiff's rights in real property. The basic premise of this article is that there is a fundamental difference between actions involving substantial individual property interests, like Schroeder, and mass actions in which individual property interests are negligible, like Eisen. When this difference is recognized, courts will be able to undertake a due process analysis which is responsive to the realities of the actions being consid-
It is also apparent that *Hansberry v. Lee* does not establish an unvarying constitutional requirement of actual individual notice to all identifiable litigants. Respondents in that case were property owners who had signed a racially restrictive covenant which provided that it should not be effective unless signed by the owners of 95 percent of the frontage within the area subject to the covenant. They sought to enjoin breach of the covenant by petitioners, who were black. Petitioners defended on the ground that owners of 95 percent of the frontage had not signed the agreement, but respondents argued, and the Illinois Supreme Court held, that the issue was resolved by the doctrine of res judicata. This holding was based on the fact that parties to a prior suit to enjoin a breach of the agreement had stipulated, albeit erroneously, that the 95 percent requirement had been met.\(^\text{161}\)

The United States Supreme Court reversed the finding of res judicata, not on the grounds that petitioners had not received notice of the prior proceeding, but because their interests had not been adequately protected therein.\(^\text{162}\) On this point the Court recognized "the dual and potentially conflicting interests of those who are putative parties to the agreement in compelling or resisting its performance . . . ."\(^\text{163}\) The limits of the rule in the case were stated in these rather precise terms:

> With a proper regard for divergent local institutions and interests, this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are bound by it.\(^\text{164}\)

The clear implication is that the absence of an opportunity to participate would not be fatal as a matter of due process in situations where the interests of the absentees were harmonious with those of the parties to the suit. In such cases, assuming the class representative adequately represents his own interests, the interests of the absentees would ipso facto be adequately protected, and the *sine qua non* of due process as stated in *Hansberry* satisfied. Applying this approach to the language of Rule 23, the requirement in the Rule that the named party adequately represent the interests of the class\(^\text{165}\) satisfies

\(^{161}\) 311 U.S. at 39.

\(^{162}\) Id. at 45-46.

\(^{163}\) Id. at 44.

\(^{164}\) Id. at 42 (citations omitted).

\(^{165}\) Fed. R. Civ. P. 23(a)(4). For the text of Rule 23(a) see note 138 supra.
the rule in the *Hansberry* decision. Thus, even if Rule 23 contained no notice requirement, it could still be said, in the words of *Hansberry*, that Rule 23 "fairly insures the protection of the absent parties who are bound by it." It is therefore, in the words of one commentator, "difficult to understand why the Advisory Committee viewed this case as establishing a due process requirement of notice to absentees in order to enable them to 'opt out,'" and it is also difficult to subscribe to Judge Medina's belief that the language of (c)(2) prescribing notice embodies a constitutional standard.

(b) *The Notice Requirements of Rule 23(c)(2)*

Freed from the imagined strictures of the due process clause, it is now appropriate to consider possible interpretations of (c)(2). Arguably, a more flexible approach than that taken by Judge Medina is desirable on grounds of policy and the wording of Rule 23. Certainly if one accepts the premise that the "historic mission of the class action is to help the smaller guy," a rigid construction of the notice requirements of Rule 23, which imposes a barrier in the form of very substantial costs, clearly would frustrate the purpose of the statute.

As *Eisen* amply illustrates, where the number of identifiable members in a class is extremely large, a requirement that each receive individual notice will for all practical purposes preclude the continuance of the suit as a class action. The prospect of any appreciable number of subsequent individual suits by members of the class is small indeed. Thus, short of enforcement by government agencies, there is no remedy for a class whose aggregate small losses make up a huge ill-gotten profit for some corporate wrongdoer. The question of notice requirements, then, may well be the single most important problem under Rule 23.

The interpretation adopted in *Eisen III*, ironically, may serve to encourage perpetrators of mass frauds to keep detailed records of the names and addresses of all their victims, so that they may all be found to be identifiable "through reasonable effort." The victims would therefore be entitled to individual notice, and thus in their multitudes be unable, due to notice expenses, to obtain any relief at all. While it is, of course, dangerous to attack any rule on the basis that it extrapolates to absurd consequences, the fact remains that one of the pur-

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167. Assuming plaintiff pays. See text accompanying notes 176-188 *infra.*
poses of class actions will be defeated by a strict construction of the notice requirements of Rule 23.

Candor requires the concession that, even where a mass wrong class action such as *Eisen* is permitted to proceed to a judgment, the likelihood of individual claims being filed by a substantial portion of the class is remote indeed. But the failure of the individual members of the class to recover their damages will afford little consolation to the defendant who under the fluid class concept has been required to pay over the gross damages suffered by the class as a whole. Obviously, the therapeutic benefit theory supports this argument for class actions. The persuasiveness of the theory in resolving the question of what type of notice is required in a given class action case involves a weighing of the potential therapeutic effects on the industry involved if the litigation proceeds as a class action against the extent to which the interests of absentee members will be prejudiced by a failure to receive individual notice.

Regarding the interests of absentee class members there are two arguments that they will not be significantly prejudiced by a relaxation of the literal language of 23(c)(2). The first, voiced by Judge Oakes in his dissent from the denial of the rehearing petition, is that there is no proof that published notice is ineffective. He therefore takes vehement issue with Judge Medina’s assertion that such notice “is a farce,” and concludes that Rule 23 was not meant to require “perfect or total notification.”

The second argument is that, as mentioned above, even if absentee class members are never effectively made aware of the suit, they are in no way prejudiced because they would neither have sued, nor, in all probability, have heard about their rights anyway. In another context, the *Eisen III* court points out that, out of six million victims, Morton Eisen was the lone voice of protest. Whatever the implications to be drawn from this fact, the *Eisen* situation is typical of mass wrong

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168. 479 F.2d at 1023-24.
169. *Id.* at 1024 (Oakes, J., dissenting). Judge Oakes states: “to say [that published notice is a farce] without any supporting data or authority, strikes me as... a ‘rhetorical device.’” *Id.* Judge Oakes points to notices of probate proceedings as one common example of effective notice by publication. He also argues that if published notice was effective and legally sufficient in the settlement of West Virginia v. Charles Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), aff’d, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971), where absent class members were ordinary consumers, then such notice should be sufficient in a case such as *Eisen*, in which the members of the class are securities investors, a presumably more sophisticated group.
170. *Id.* at 1024.
171. *Id.* at 1010.
class actions where few members of the class are aware of the wrong, and the informed few are likely to be disinclined to go to court over their small claims. Thus, the argument that absentee class members will be unconstitutionally prejudiced is deficient in a manner with which we are now familiar: it avoids the realities of the situation and focuses on concepts derived from "traditional" litigation.

Thus the "harm" suffered by the members of the class as a result of a less demanding interpretation of Rule 23 is minimal. It is far outweighed by the substantial therapeutic benefits to be gained by adoption of a more realistic interpretation of the notice provisions of the Rule.

Turning to the explicit wording of the section we see that it is certainly a permissible construction of the section to read it merely as offering "individual notice to those who are reasonably identifiable" as an example of what might constitute the best notice practicable. Certainly "practicality" is mentioned in such a way that a reasonable reading of the section would require a court to (1) give the best notice which (2) was practicable in the situation, and among the possible forms of "best notice" would be individual notice to those class members who can be identified with reasonable effort.172

(c) The Effect of the Right to Litigate

To recapitulate, we have concluded, contrary to Judge Medina, that neither the Constitution nor the language of Rule 23(c)(2) prohibits a liberal reading of the Rule's notice provisions. The argument will now be made that a liberal interpretation of Rule 23's notice requirements is in fact compelled by the presence of the right of meaningful access to the courts as a limitation on the power of the judiciary and the legislature to impose insuperable procedural obstacles to litigation.

The net combined effect of the Boddie and Button cases might be stated as follows: where judicial relief is the only feasible means of dispute resolution, a validly enacted statute which has the practical effect of denying access to the courts will, absent a significant countervailing interest, be struck down as unconstitutional in its application; particularly when such judicial relief is achievable only through associational activities and the statute has the effect of inhibiting such

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association. Thus, the interests of the state in preserving high ethical standards in the legal profession, and in financing court administration through the imposition of fees upon litigation, were in those cases, held secondary to the right of meaningful access to the courts.

In considering the (c)(2) notice requirement, an understanding of this right suggests that a proper approach would begin with an inquiry into the extent to which meaningful access to the courts will be inhibited by a notice requirement which imposes what will often be insurmountable obstacles to the plaintiff class representatives. On this point, it is everywhere recognized that in the great majority of class actions, refusal to permit the suit to proceed on a class basis is "tantamount to a denial of private relief."173 Indeed, that is the express rationale of the "death-knell" opinion (Eisen I) mentioned above.174 Thus, it is clear that a strict notice requirement does significantly inhibit meaningful access to the courts, and has the effect of denying the right to associate into classes for purposes of litigation.

It remains, however, to consider the countervailing interest which the statute was enacted to protect. The countervailing interest supporting a rigid interpretation of (c)(2) is the protection of the due process rights of absentee class members.175 However, we have seen that the due process rights to notice of civil litigation depend upon a balancing of factors and due to the small claims and ignorance of the class members their interest in obtaining individual notice is minimal. Certainly their interest in such notice is less substantial than that of the state in financing its court administration, asserted in Boddie, and no more substantial than the claimed state concern over legal ethics in Button. Thus, rather than being required by the due process clause, the Eisen III construction of (c)(2), which precludes continuance of the suit as a class action and effectively bars the class members from the litigation process, arguably constitutes a denial of the due process rights of the members of the class.

174. See note 26 supra.
175. It is ironic that this argument is advanced by defendants on behalf of potential members of the plaintiff class. Defendants thus seek to avoid liability by heated advocacy of the constitutional rights of those who claim to be their victims. This bizarre situation is made possible by the court's rigid adherence to the fiction that the interests of absentee class members will somehow be prejudiced by a failure to receive notice. When it is realized that absentee class members have no interest in receiving notice, then it will be apparent that defendant's argument has no basis in reality. Thus the irony of defendant asserting plaintiff's rights is symptomatic of a failure to perceive, in realistic terms, the interests which are truly at stake in a class action.
2. **Allocation of Notice Costs**

In an effort to achieve a fair allocation of the costs of notice, Judge Tyler held a preliminary "mini-hearing on the merits," despite the explicit direction by the Second Circuit in *Eisen II* that plaintiff was to bear the costs. 176 Concluding from the hearing that plaintiff was likely to win any subsequent full-scale trial on the merits, he ordered defendant to bear 90 percent of the notice costs, and plaintiff the balance.

The Second Circuit rejected this procedure on a number of grounds. The most basic was that since *Eisen II* had remanded only for the purpose of a determination as to whether the requirements of a class action had been met, the preliminary mini-hearing on the merits was conducted without jurisdiction. 177 The most important substantive ground, however, was that "no provision is made in amended Rule 23 for any such mini, preliminary or other hearing on the merits." 178

The issue of whether costs of (c)(2) notice can be assessed against a defendant is one of the most perplexing aspects of revised Rule 23. The practical effect of the issue would, of course, be lessened if the liberal approach to the individual notice requirements mentioned above is adopted. 179 Notwithstanding the adoption of a discretionary interpretation, in many cases notice expenses would still be very large indeed. 180 Both sides can make a strong argument that having to bear the burden of notice costs prior to a final determination of liability would be onerous and unfair.

The clear consensus in the commentaries is that plaintiff should bear the burden, 181 a position with which the Second Circuit is in general agreement. However, the basis for the court's position is very unclear. In *Eisen III* the court expressly concedes that there may be class actions in which plaintiff should not be required to bear all notice costs.

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176. 391 F.2d at 568.
177. 479 F.2d at 1016.
178. *Id*.
179. For example, the (c)(2) notice ordered by Judge Tyler was expected to involve an expense of $21,720. 52 F.R.D. at 263. By contrast, individual notice to each class member who was reasonably identifiable was estimated at one point to involve an expenditure of $400,000. 391 F.2d at 568.
180. These cases would involve large classes with substantial claims and/or possibly conflicting interests.
costs.\footnote{479 F.2d at 1009 n.5.} It then gratuitously adds a puzzling reference to a statement in the Advisory Committee's notes that "the provisions for notice in amended Rule 23 were intended to comply with constitutional requirements."\footnote{Id.} Thus, the clear implication arises that the allocation of notice costs involves constitutional considerations, but the discussion preceding the implying statement made no mention of such considerations. The statement of the Advisory Committee is also irrelevant because the question as to who should pay costs has nothing to do with the question as to what notice is sufficient to comply with the requirements of due process. Adding further confusion on this issue is the fact that Judge Hays, who concurred in the result in \textit{Eisen III}, did so on the sole ground that the defendants would not be reimbursed for the expenditure of 90 percent of the cost of notice even if they prevailed.\footnote{Id. at 1020.} Although unfortunately brief, Judge Hays' concurrence is tantalizing and seems to indicate the possible constitutional problems with any order requiring the defendant to pay all or part of the costs of notice to the members of the plaintiff class.

Simply stated, the defendant can only lose under an order of the type made by Judge Tyler. If the plaintiff class prevails, the defendant has, of course, no \textit{right} to be reimbursed. If the defendant wins, he probably has no right to such full reimbursement from the named class representatives since the costs incurred were not all for the named representative's benefit. While, in theory, the defendant would have a right to seek full reimbursement from the entire class, in an \textit{Eisen} situation where a large portion of the class is unidentifiable, the defendant would never be able to collect the full notice costs he incurred from all of the class members. Even assuming that a large proportion of such a class could be located after a judgment against the class (a rather improbable assumption) what amount would be collected from each? In all probability, in the usual mass fraud situation, the defendant as a practical matter could not obtain reimbursement. Thus, he would be deprived of property, (the money which paid the cost of notice) on the basis of a procedure which is something less than a full and fair hearing on the merits. He could therefore argue persuasively that his due process rights had been violated.

On the other hand, the named plaintiff representative of the class may not be able to afford to pay the costs of notice even in the situation when a court has certified the class as being proper. For the
same considerations mentioned above, it would indeed be unfortunate if the practical difficulties of financing notice foreclosed an otherwise valid class action.

There is no simple solution to the problem, but when a particular approach is adopted it should be carefully reasoned. Judge Medina fails to do this and further confuses the issue of notice costs by treating the allocation of notice costs and the preliminary hearing separately. Judge Tyler held the mini-hearing in order to determine who should bear the costs of notice, but Judge Medina treated the two problems in isolation. Thus, his authority for rejecting Judge Tyler's mini-hearing was *Miller v. Mackey International, Inc.*, a case which involved a wholly different problem. In that class action, the district court had, at the (c)(1) "maintenance hearings," considered the merits of plaintiff's claim, rather than whether plaintiff had met the requirements of Rule 23. The United States Court of Appeals for the Fifth Circuit reversed, properly pointing out that the merits were not to be considered in determining whether plaintiff had met the requirements of Rule 23.

In fact, the preliminary mini-hearing as used by Judge Tyler was unprecedented. There was no authority to support it, and none opposed to it. It does, however, appear to reflect the kind of resourcefulness and exercise of judicial discretion contemplated by the drafters of Rule 23.

As has been pointed out before, the failure of Rule 23 to provide for such a mini-hearing procedure does not operate as an implicit proscription. Particularly in view of the equitable nature of class actions, and the encouragement which the draftsmen of Rule 23 gave to judges to exercise their ingenuity with an eye toward effectuating statutory purpose, the summary rejection of this procedure by the Second Circuit seems inappropriate.

This inappropriateness is particularly acute in view of the right of meaningful access to the courts which was, of course, neglected by Judge Medina. The proper analysis of due process requirements regarding cost allocation is similar to that used on notice requirements, above, and certainly the total imposition of notice costs on the representative plaintiff may significantly inhibit the availability of judicial relief. However, the defendant's countervailing interest appears to be far more substantial than the presumed due process rights of absen-

185. 452 F.2d 424 (5th Cir. 1971).
tee class members. There is a very real danger, as pointed out above, that a defendant who is forced to bear the burden of notice costs and then wins on the merits will be unable to recoup those expenses. The choice is by no means clear. The cases conflict, but those which apportion at least a share of the notice costs to the defendant appear, in general, to have undertaken a more thoughtful approach to the problem.  

It appears by far the preferable solution to approach the problem with an eye to the peculiarities of each case. It may be that regular correspondence between the defendant and the individual class members would greatly diminish the dimensions of the problem. Or a preliminary hearing on the merits may be employed, and when the evidence adduced therein was overwhelming one way or another, it would seem the least of the evils to allocate the bulk of the notice costs to the party who had made the weaker showing. Perhaps a summary judgment standard could be used in such a hearing in order to overcome due process objections to requiring defendant to shoulder a portion of the financial burden. In any case, it appears that some such approach is infinitely preferable to closing the courthouse doors to a clearly meritorious claim simply because plaintiff cannot afford the costs of notice.  

3. The Fluid Class Recovery Concept

One of the matters "pertinent" to a finding that a class action is "superior," under 23(b), to other methods of relief, is the existence of difficulties likely to be encountered in the "management" of the class action." Judge Lombard had dissented in Eisen II, contending that the number of individual claims likely to be filed by class members, even assuming a judgment against defendant, was so small that the aggregate claims would be far exceeded by the costs of administering the action. On this basis he argued that the class action was "unmanageable."  

Judge Tyler's solution to this problem was to adopt the "fluid


188. It is interesting to note that in California a specific and rather detailed class action for consumer abuse situations was legislated in 1970. This procedure expressly gives the court the power to allocate notice costs in its discretion to either plaintiff or defendant. CAL. CIv. CODE § 1781(d) (West Supp. 1974). The validity of this legislative grant of discretion is, of course, called into question by Eisen III.


190. See 391 F.2d at 571 (Lumbard, J., dissenting).
class recovery," under which gross damages were to be assessed based on the injury to the class as a whole.\textsuperscript{191} Defendant's liability would thus not be limited to the aggregate of claims filed by individual members, but would include the \textit{entire} damages suffered by the class, as ascertained from defendant's own records.\textsuperscript{192} The class members would then receive individual notice, to be financed at that point out of the established total recovery. Each could then come forward to establish the amount of his individual claim against the gross award.\textsuperscript{193}

\textsuperscript{191} 52 F.R.D. at 262, 264.
\textsuperscript{192} 52 F.R.D. at 262. Judge Taylor also noted other sources of information from which damages could be computed, namely: SEC, \textit{REPORT OF SPECIAL STUDY OF SECURITIES MARKETS}, H.R. Doc. No. 95, Pt. 2, 88th Cong., 1st Sess. (1963); records of the NYSE Special Committee on Odd Lots; and a cost study of the odd-lot industry conducted for the NYSE by Price Waterhouse & Co.
\textsuperscript{193} Assessment of gross damages against a defendant when that sum is ascertainable without the testimony of individual class members will be referred to in this article as "fluid class recovery." Other expressions have been employed to describe this procedure, notably "lump sum recovery," a phrase used by Professor Arthur Miller. Miller, \textit{Problems in Administering Judicial Relief in Class Actions Under Federal Rule 23(b)(3)}, 54 F.R.D. 501 (1972). This article adopts the nomenclature used by both Judge Tyler and Judge Medina. The gross money award itself has often been informally referred to as the "pot of gold," partially in recognition of its attractiveness to private attorneys representing large classes, whose fees depend in part upon the dimensions of the class recovery.

\textsuperscript{193} Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967), is a good illustration of the mechanics of fluid class recovery. To simplify the facts slightly, plaintiff alleged that defendant had adjusted its taxicab meters to register rates in excess of those approved by the Public Utilities Commission. Plaintiff, claiming to represent a class consisting of all of defendant's customers, sought damages equal to the total amount of the unlawful overcharges. The court, in ruling on defendant's demurrer, assumed the truth of plaintiff's allegation that the exact amount of the overcharge could be ascertained from defendant's records.

Under traditional notions, defendant's liability would have been limited to the aggregate of individual claims actually filed by individual cab users. Thus, even though defendant's own records may have disclosed a total unlawful overcharge of $100,000, if the aggregate sum of individual claims actually filed subsequent to the judgment were only $15,000, than that would be the extent of defendant's liability. The California Supreme Court, however, held that, assuming that the total unlawful overcharge could be ascertained from defendant's own records, "no appearance by the individual members of the class will be required to recover the full amount of the overcharges . . . ." 67 Cal. 2d at 716, 433 P.2d at 747, 63 Cal. Rptr. at 739. Thus, a judgment for plaintiff would render defendant liable for the entire $100,000, even if no other individual claims were filed.

Disposition of the unclaimed portion of the "pot of gold" after a suitable time for the filing of individual claims is a separate problem which has received substantial attention in its own right. See, e.g., Miller, \textit{Problems in Administering Judicial Relief in Class Actions Under Federal Rule 23(b)(3)}, 54 F.R.D. 501 (1972); Note, \textit{Damage Distribution in Class Actions: The Cy Pres Remedy}, 39 U. CHI. L. REV. 448 (1972).
After distinguishing the precedents cited by Judge Tyler for the fluid class recovery device, the Second Circuit rejected it as a permissible procedure, stating its entire rationale in one unenlightening paragraph:

Even if amended Rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject it as an unconstitutional violation of the requirement of due process of law. But as it now reads amended Rule 23 contemplates and provides for no such procedure. Nor can amended Rule 23 be construed or interpreted in such a fashion as to permit such procedure. We hold the "fluid recovery" concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper.

Turning first to Judge Medina's dictum to the effect that fluid class recovery would violate due process of law, it is hard to conceive that this procedure would prejudice defendant in any unconstitutional manner. Gross damages, meaning the total amount of illegal profit received by defendant, would be proved by defendant's own records to a legal certainty, thus testimony of individual class members would be neither needed nor relevant. Such would be the case only in situations where the state of mind of individual class members is not relevant in determining the total liability to the class. Given this circumstance, defendant's substantive liability is in no way altered by his inability to confront each class member individually. He is liable for more than he would have been were the injuries of some of his victims allowed to go unrecompensed, but this is certainly not objectionable.

There is precedent for the position that defendant has no constitutional right in such a case to confront each individual class member. As a result of the rash of bank failures in the 1930's a number of depositors' class suits against insolvent banks were filed. Illinois state statutes made certain bank stockholders primarily liable for the bank's debts to its creditors. In a series of cases beginning with Heine v. Degen, the Illinois Supreme Court considered the practice under which the receiver was authorized to receive from the shareholders

194. 479 F.2d at 1012.
195. Id. at 1018.
196. For example, fluid class recovery would not be proper if the cause of action involved an element such as the individual reliance (on a false representation) of each member of the plaintiff class and the law of the jurisdiction required that such reliance could only be proved by testimony from each class member. In such a case, a procedure by which defendant was denied the opportunity to examine class members in such a case would be highly prejudicial.
197. 362 Ill. 357, 199 N.E. 832 (1935).
the amounts which, according to the bank's books, were found due the creditors. The shareholders attacked the procedure as a denial of due process of law, in that they were denied the opportunity to confront each creditor claimant individually. The analysis of the court in *Lewis v. West Side Trust & Savings Bank* precisely answers the argument that fluid class recovery operates to deny the defendant due process of law.

It must be remembered that these defendants had access to the books of the bank and an opportunity to show therefrom that their liabilities should have been further diminished or wiped out entirely by reason of claims the bank had against its creditors. They have failed to point out wherein they or any of them suffered damage by reason of the fact that plaintiffs were not required to make the proof they insist on.

It is submitted, therefore, that the asserted constitutional right violated by fluid class recovery is a fiction, and thus that it does not pose a problem for use of the fluid class concept if it otherwise seems desirable. As discussed previously, the therapeutic effects theory would clearly establish the desirability of fluid class recovery class actions even if only a handful of the members of the class actually receive damages. Of course, for those class members who do obtain recovery, their right to meaningful access to the courts is secured only by the adoption of fluid class recovery, since there is no practical alternative available. Thus, there is no due process constraint which would bar the fluid class recovery concept.

Judge Medina's assertion that Rule 23 cannot be read to authorize fluid class recovery is equally unconvincing. The failure of Rule 23 to provide for this remedy can hardly be sufficient, for Rule 23 is utterly silent on the matter of recovery. Indeed, no method of computing damages is contemplated, authorized or prohibited by Rule 23. Thus a court is free to adopt any theory of recovery in a class action case without any limitation due to the prescribed procedure. It is significant that a number of courts have embraced the fluid class concept, although usually in the context of a settlement of the class action litigation. However, at least one important decision has accepted the fluid class recovery concept in contested litigation. Judge Medina's treatment of this precedent, *Daar v. Yellow Cab Co.*, is highly

198. 376 Ill. 23, 32 N.E.2d 907 (1941).
199. *Id.* at 32, 32 N.E.2d at 913.
201. 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).
debatable to say the least. Judge Medina states first that Daar involved "a state class action statute very different in its phraseology from amended Rule 23."202 The state class action statute is indeed drawn in far more general language than is Rule 23.203 However this difference is irrelevant because the California statute, like Rule 23, contains no language relating to class action remedies, and the Daar decision actually rests upon policy determinations which are applicable to class actions generally.204 In addition, the Second Circuit decision is internally inconsistent on this point since if fluid class recovery is unconstitutional, the appropriate handling of Daar would be to state that it was incorrectly decided, not that it is merely distinguishable.

Judge Medina then points out that the decision in Daar was on a demurrer, thus: "the approach to the issues was entirely different from the making of a judicial determination, on the basis of proof, of whether or not the requirements of amended Rule 23 had been met."205 This is equally unpersuasive. No proof is necessary to a determination whether fluid class recovery is or is not a permissible procedure under Rule 23 and the Constitution. It is not an evidentiary question. The question whether it should be applied in a given case should not be confused with the question whether it is ever permissible.

Finally, the Second Circuit distinguished Daar on the ground that the California court was "evidently of the view that the individuals who had been damaged . . . would ultimately have to prove their separate and individual damages."206 This is even less persuasive than the

202. 479 F.2d at 1012.
203. "If the consent of anyone who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." CAL. CODE CIV. PROC. § 382 (West 1973).
205. 479 F.2d at 1012.
206. Id.

Author's Note: On May 28, 1974, the United States Supreme Court rendered an opinion affirming, with considerable limitations, the Second Circuit's decision. See Eisen v. Carlisle & Jacquelin, U.S.——(1974), 42 U.S.L.W. 4804. As elaborated hereafter, the Supreme Court's Eisen opinion, written by Justice Powell, passed on only two of the three issues ruled upon in Eisen III. The Court expressly determined those issues, the required form of notice and the allocation of the cost of such notice, on the narrow ground that the language of Rule 23 did not permit the district court to
prior arguments. *Any* fluid class recovery contemplates that individual class members will have to come and prove their injury for their

authorize published notice and require the defendants to pay 90 percent of the cost. Thus, the specific requirements of the due process clause in regards to these class action procedures are still unsettled issues.

The issues are, of course, of great magnitude because Congress will undoubtedly be asked to consider amending Rule 23 to alter its language in regards to form of notice and allocation of costs. Such amendments, if they are to be valid, must comply, of course, with the requirements of the due process clause. Furthermore, certain state class action statutes, such as California Civil Code Section 1781, deviate significantly from the relevant language of Rule 23 concerning form of notice and cost allocation. These statutes must also comply with the due process clause of the Fourteenth Amendment.

The Supreme Court opinion begins with review of the progress of the litigation, demonstrating, according to Justice Powell, that the case had lived up to Judge Lum-bard's characterization of it as a "Frankenstein monster posing as a class action." See 42 U.S.L.W. at 4808. The Court then determined that it had jurisdiction to review both the district court's order imposing 90 percent of the cost of notice on the defendant and the district court's ruling that notice of publication was sufficient. See discussion of this aspect of the Supreme Court's opinion in note 63, supra. The Supreme Court specifically declined to rule upon Judge Medina's resolution of the issue of manage-ability and fluid class recovery on the ground that an affirmation of the second circuit's rulings on the notice requirements of Rule 23 completely disposed of the plaintiff's class action as initially formed. See footnote 10 of the Supreme Court's opinion at 42 U.S.L.W. 4809.

The Court decided that the specific language of Rule 23 required individual notice to all class members who could be identified with reasonable effort and that the Rule could not be read to authorize any procedure by which all or a portion of the notice costs could be imposed upon defendants. Noting that the plaintiff had consistently maintained that he would not pay for the cost of individual notice to members of the class as described in his complaint, the Supreme Court vacated the judgment of the Court of Appeals and remanded the case to the district court with instructions to dis-miss the class action as defined in the plaintiff's complaint. See 42 U.S.L.W. 4811. On this point, Justice Powell stated that the dismissal of the class action as originally defined was without prejudice to any further efforts which the plaintiff might wish to undertake to redefine the class (presumably to include fewer members) and to prose-cute the action on behalf of such a newly defined class if the plaintiff was willing to pay for individual notice to identifiable members of that class. 42 U.S.L.W. 4811.

Mr. Justice Douglas, joined by Justices Brennan and Marshall, wrote a separate opinion concurring with the majority holding on the form of notice and the allocation of cost. However, the Douglas opinion dissents from the majority in that it would not dismiss the class action as originally defined but would remand the case to the lower court with instructions to preserve the existence of the full class described in the complaint while formulating an appropriate subclass to which the required individual notice, to be paid for by the named plaintiff, would be given. This newly formulated subclass would then be authorized to prosecute its class claims against the defendants to a judgment. The effect of such a subclass judgment upon the rights of the full class described in the original complaint is not determined in the concurring opinion nor is the appropriate future treatment of the originally described full class discussed.

The Supreme Court's choice to decline to rule on Judge Medina's rejection of fluid class recovery is indeed unfortunate. Since Judge Medina's rejection of fluid class recovery was seemingly based upon due process grounds, lawyers and courts
The burden of the proof would be much lighter in *Eisen* than in *Daar*, since in the former the company's own records involved in class actions where fluid class recovery appears to be appropriate will be faced with the question which he raised concerning the constitutional validity of such a procedure. For the reasons indicated in the text of the article accompanying notes 194-99, it is the author's opinion that due process does not prohibit the use of this procedure. It should be noted that the strong statement concerning the necessity of flexible class action procedures in order to provide remedies for small claimants in mass wrong situations appearing in Justice Douglas' concurring opinion can henceforth be cited as strong support for the views expressed in this article in support of the validity of fluid class procedures. See 42 U.S.L.W. 4812-4813.

On the issue of cost allocation, the Supreme Court specifically based its decision upon the language and history of Rule 23 which, the Court felt, gave no authority to a trial court to conduct a preliminary inquiry into the merits of the action nor to impose costs initially on the defendant. (See 42 U.S.L.W. 4810-4811). As indicated in the article in the text accompanying notes 179-88, supra, the issue of whether a cost allocation order complies with the requirements of the due process clause is a difficult one. Since the Supreme Court makes no allusion to constitutional requirements in its discussion of the issue, however, the legal community must fall back on the type of analysis indicated in this article in attempting to resolve it. The issue may eventually be presented in connection with state statutes such as California Civil Code Section 1781(d). This section specifically gives a trial court the authority to direct either party to notify members of the class in a consumer class action brought under the provisions of the California Consumers Legal Remedies Act. Whether this statutorily granted cost allocation discretion is valid under the United States Constitution is undetermined and the Supreme Court's *Eisen* opinion furnishes no new guidance on the question.

In determining the form of notice required by Rule 23(c)(2) the Court declared: "We think the import of the language is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort." 42 U.S.L.W. 4809. Further, the Court states that such notice "is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23." 42 U.S.L.W. 4810. This construction, following the traditional "plain meaning" doctrine of statutory interpretation, clearly and conclusively resolves the question of what form of notice is required by the present working of Rule 23(c)(2). The Court's further discussion of the issue, discussed hereafter, is clearly dictum.

The Supreme Court viewed the intent of the drafters of Rule 23, as expressed in the Advisory Committee Note to Rule 23, as bolstering its conclusion that the language of the Rule requires individual notice. See 42 U.S.L.W. 4809. The Court proceeds to elaborate the concern of the Advisory Committee that the design of the notice provisions of Rule 23 incorporate minimum due process requirements. Referring to the Committee's citation of *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950), the Court determines that the drafters believed that the *Mullane* decision requires individual notice to known class members as a matter of due process. This perception of the Committee's belief is shared by most commentators. See notes 147, 148 supra, and accompanying text. As noted in the article, the vast majority of scholarly commentary does not agree with the implications drawn from *Mullane* by the Committee. See footnote 151, supra. Of utmost significance is the fact that the Supreme Court does not state approval for the reasoning and belief of the Committee.

However, the Court possibly implies such approval by its discussion of a decision
presumably contained, as to each class member, all the proof necessary, while in *Daar* (a class suit for taxi fare overcharges), defendant had no records from which the damages to individual plaintiffs could be ascertained.

Even assuming, however, that all authorities cited by Judge Tyler were legitimately distinguishable, it is a question-begging approach, especially in an area so peculiarly appropriate for the exercise of judicial discretion, to hold that a particular procedure is impermissible simply because it has never been permitted before. The argument that there is nothing in Rule 23 that prohibits fluid recovery is as valid as the

not cited by the Advisory Committee, *Schroeder v. City of New York*, 371 U.S. 208 (1962). See discussion of the *Schroeder* decision in note 160, *supra*. *Schroeder*, a decision based upon *Mullane* as precedent, is viewed by the Court as having established a general rule of individual notice to known class members. See 42 U.S.L.W. 4809-4810. However, once again, the Court does not state that the general rule of the *Schroeder* decision is compelled by the due process clause.

The reason for the Court's discussion of the concern behind the Committee's expressed intent and the *Schroeder* decision is, at a minimum, unclear. However, it can be speculated that the two most likely reasons for the Court's inclusion of this section in its opinion are:

(a) The Court may be warning a future Congress desiring to amend Rule 23 that published notice is never sufficient when the names and addresses of class members are reasonably ascertainable. This reason is unlikely for if the Court meant to say this, Justice Powell certainly would not have been reticent about doing so.

(b) On the other hand, the Court may be warning state and federal draftsmen of class action statutes that they may, constitutionally, explicitly authorize notice by publication to known class members but only in situations dissimilar to the facts involved in *Mullane* (involving substantial trust beneficiaries) and *Schroeder* (involving substantial property interests and eminent domain proceedings). The special nature of the facts in these decisions is discussed in the text accompanying footnotes 149 through 160, *supra*. Otherwise such an authorization will be held to violate the due process clause as interpreted in those cases. Of note in this regard is the previously mentioned California Civil Code section 1781(d) which does explicitly authorize notice by publication to known class members and which is of a broader and more general character than might be permitted by the Court's thoughts as revealed in the *Eisen* decision.

Before the Supreme Court, the plaintiff made the expectable arguments that individual notice should not be required because the prohibitive expense would end the suit as a class action and, in any case, since the class members' individual claims were so small, no class member would choose to opt out in response to such notice. The Court's short and blunt answer to both arguments was that individual notice is an unambiguous requirement of Rule 23. See 42 U.S.L.W. 4810. Significantly, the Court again did not address itself to, or mention, due process requirements. Thus it might again be inferred that Congressional draftsmen could amend Rule 23 to explicitly allow published notice to known class members in class actions involving mass wrongs or other types of fact situations different from those present in the *Mullane* and *Schroeder* cases.
argument that there is nothing in the Rule which authorizes it. Thus absent due process obstacles, and we have already seen that there are none, it appears that fluid class recovery is a device which naturally and forcefully furthers the same basic policies which support class actions in general. There is no reason not to accept the device in appropriate cases, such as *Eisen*, and it should be adopted widely as a method for computing class action damages in the future.

III. Conclusion

The above discussion analyzes three areas of controversy raised by the *Eisen III* decision concerning the use of class action procedures. The ultimate resolution of these three issues will, for the reasons indicated, determine the viability of class actions in mass wrong situations. Since such mass wrongs are a relatively common result of consumer abuse, and since public law enforcement must be complemented by effective private action, the vitality of mass wrong class action procedures is an imperative for adequate consumer protection in our society.

On the three major issues decided in *Eisen III*, it is this author's opinion that Judge Medina employed an incomplete and in some instances flatly incorrect analysis. These failings result from an outdated and incorrect concept of the resources, sophistication, and economic incentives of the respective parties to any litigation generated by a mass wrong. This concept, which forms the mold for Judge Medina's interpretation of the notice requirements of the due process clause, should be discarded. A more flexible conception of the attributes and resources of actual or possible litigants needs to be substituted. Once this basic adjustment in thinking is accomplished, the balancing process which each of the three issues requires becomes far more reasonable and yields, on at least two of the issues, rather clear answers.

First, the problem of what constitutes sufficient notice to satisfy statutory and constitutional requirements involves a balancing of the right of meaningful access to the courts together with the therapeutic benefits from class litigation against the interest of the absent members of the class in receiving notification of the existence of the action. The latter interest is largely illusory for reasons discussed previously, and is clearly overbalanced by the first two considerations. This being the case, the judicial interpretation of the due process clause's notice requirements should be lenient, and individual notice should not be held required either by the due process clause or by Rule 23, since
judicial discretion to implement dominant policies can be exercised under both.

With respect to the problem of the allocation of notice costs, the same considerations militate for a shifting of the burden from plaintiff when the class claim is clearly meritorious. However important considerations of fairness support the position that defendant should not be forced to bear part of the cost when, in the event he wins on the merits, he will be unable to recoup his costs. Thus, the balancing of the considerations in the abstract yields no conclusion applicable in all cases. Accordingly, each case must be approached with a sensitivity to these considerations, and a result sought which seems to be the fairest under the circumstances.

Finally, the fluid class recovery issue involves, on the one hand, the therapeutic benefits of large class recoveries, and on the other, the fiction that defendant is somehow prejudiced unconstitutionally by his inability to confront and examine individual class members. Resolution of these competing considerations presents no problem, because the latter is imaginary. The conclusion is that fluid class recovery ought to be invariably allowed in order that class actions may serve as a deterrent to dishonest and unfair business practices.

This consideration of the relationship between the requirements of the due process clause and the field of consumer protection has taken a distinctively negative view of the most recent precedent in the field of class actions. However, the reader should not be left with the idea that the author's attitude is unremittingly critical toward all judicial applications of the due process clause in the area of consumer protection, for indeed it is not. The realities of the consumer-seller relationship are perceived in a realistic and enlightened manner in a considerable number of recent due process decisions involving consumer protection issues. Those decisions deserve, and will receive, our attention at a later date.